United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

74-1604

UNITED STATES COURT OF APPEALS

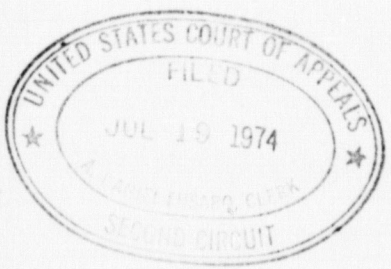
For the Second Circuit

Docket No. 74-1604

Ogden Development Corporation and
The Dwight Building Company,
Plaintiff-Appellants,
-against-

Federal Insurance Company,
Defendant-Appellee

APPENDIX TO BRIEF FOR PLAINTIFFS-APPELLANTS, ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



ROGERS & WELLS
Attorneys for Plaintiffs-Appellants
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New York, New York
Tel. 972-3963

PAGINATION AS IN ORIGINAL COPY

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Pertinent Docket Entries

December 7, 1972	Filed complaint and issued summons.
December 7, 1972	Filed application for service by an individual other than U. S. Marshal. Clerk.
December 8, 1972	Filed summons and return served Federal Insurance Co. on December 7, 1972 by Roy McBride.
January 10, 1973	Filed stipulation and order that the time for defendant to answer to complaint is extended to January 16, 1973. So Ordered Tenney J.
January 19, 1973	Filed stipulation and order that the time for defendant Federal Insurance Co. to answer to complaint is extended to January 30, 1973. Tenney J.
February 20, 1973	Filed answer.
July 27, 1973	Filed plaintiff's affidavits and notice of motion for summary judgment, return August 10, 1973.
July 27, 1973	Filed plaintiff's memorandum in support of motion for partial summary judgment, return August 10, 1973.
September 28, 1973	Filed defendant's affidavit and notice of cross-motion for summary judgment, return October 5, 1973.
September 28, 1973	Filed defendant's memorandum of law in opposition to plaintiff's motion for summary judgment and in support of his motion for summary judgment.
October 2, 1973	Filed answering affidavit of W. W. Owens to defendant's cross-motion.
October 2, 1973	Filed plaintiff's answering and reply memorandum.

Pertinent Docket Entries

October 4, 1973	Filed defendant's reply memorandum in support of its cross-motion.
February 13, 1974	Filed defendant's interrogatories to plaintiffs.
March 22, 1974	Filed Opinion #40494. Defendant's motion for summary judgment dismissing complaint is granted and plaintiff's motion is denied in its entirety. Submit Judgmetn in Accordance with this Opinion Within 10 days of filing of this opinion. Tenney, J. (mn).
March 26, 1974	Filed stipulation and order adjourning plaintiff's motion for summary judgment to September 7, 1973. Tenney, J.
March 26, 1974	Filed stipulation and order adjourning to September 21, 1973. Tenney, J.
April 2, 1974	Filed order and judgment. Motion of plaintiffs be and is denied in its entirety; ordered that motion of defendant be and is granted. Complaint is hereby dismissed. Tenney, J. Judgment entered. Clerk (mn) Entered April 5, 1974.
April 29, 1974	Filed plaintiffs Ogden Development Corporation and The Dwight Building Company's Notice of Appeal from Judgment dated April 1, 1974 and entered on April 2, 1974 dismissing complaint. (Mailed copy to Hart & Hume on April 30, 1974.)
April 29, 1974	Filed undertaking for costs on appeal in sum of $250.00 (National Surety Corporation).

Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OGDEN DEVELOPMENT CORPORATION and THE DWIGHT BUILDING COMPANY, Plaintiff, -against- FEDERAL INSURANCE COMPANY, Defendant.	:	72 Civil 5180 CHT

Notice is hereby given that Ogden Development Corporation and The Dwight Building Company, plaintiffs above named, appeal to the United States Court of Appeals for the Second Circuit from the judgment dated April 1, 1974 and entered in this action on April 2, 1974 dismissing the complaint.

Dated: April 29, 1974

Rogers & Wells
Attorneys for Plaintiffs

By William W. Owens
A Member of the Firm
Office and P.O. Address
200 Park Avenue
New York, New York
Tel. 972-3963

Notice of Appeal

To: Clerk of the United States
District Court
40 Centre Street
New York, New York

Hart & Hume, Esqs.
Attorneys for Defendant
10 East 40th Street
New York, New York

Order and Judgment Appealed From

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

OGDEN DEVELOPMENT CORPORATION and THE DWIGHT BUILDING COMPANY,

Plaintiffs,

-against-

FEDERAL INSURANCE COMPANY,

Defendant.

72 Civ. 5180 (CHT)

- x

Plaintiffs having moved for summary judgment, interlocutory in character, on the issue of liability, or in the alternative for an order pursuant to Fed. R. Civ. P. 56(d) specifying facts appearing to be without substantial controversy, and defendant having cross-moved for summary judgment dismissing the complaint, and said motions having been submitted to the Court on October 5, 1973, and the Court having filed its memorandum opinion dated March 22, 1974, it is

ORDERED, that the motion of plaintiffs be and the same is hereby denied in its entirety; and it is further

ORDERED, that the motion of defendant be and the same hereby is granted; and it is further

Order and Judgment Appealed From

ADJUDGED, that the complaint herein be and the same is hereby dismissed.

Dated: New York, New York
April 1, 1974

/s/ Charles H. Tenney
United States District Judge

Judgment Entered Apr. 2, 1974

Raymond F. Burghardt
Clerk

Opinion of the District Court
Charles H. Tenney, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

[SAME TITLE]

- x

FILED

U.S. DISTRICT COURT

MAR. 22, 1974
3:15 P.M.
SDNY

72 Civ. 5180 (CHT)

MEMORANDUM

#40494

TENNEY, J.

This is an action under 28 U.S.C. § 1332 to recover under a performance bond. Plaintiffs have moved, pursuant to Fed. R. Civ. P. 56(c), for summary judgment, interlocutory in character, on the issue of liability, or in the alternative, pursuant to Fed. R. Civ. P. 56(d), for an order specifying which facts appear to be without substantial controversy. Defendant, surety under the performance bond, has cross-moved for summary judgment dismissing the complaint. For the reasons stated infra, plaintiffs' motion is denied and defendant's motion for judgment dismissing the complaint is granted.

It is necessary to give a brief summary of the background of this suit. In September 1969, the University

of Vermont ("the University") began to experiment with an educational concept under which a fraction of the student body lived and studied together, apart from the main student body. The experiment was so successful that, a year later, the University decided to expand the program by designing and building a complex to be known as a "living/learning center" ("the Center").[1/] In mid-1972, it publicized its intention to inaugurate a contest for the design and construction of the Center. The University retained an architect to assist in the preparation of a document called "Request for Proposals" ("the Request"), which was intended to specify upon what grounds a contract for the design and construction of the Center would be awarded. The University was granted $12,000 by the Educational Facilities Laboratories in New York to develop the Request.

After the Request had been prepared, the University issued to groups which had expressed an interest in the contest a separate brochure entitled "Pre-Qualification Documents" ("the Brochure"). The Brochure gave a brief explanation of the purpose of the contest and asked that would-be participants file certain documents in order to qualify for receipt of the Request. It was also stated:

> "1. In order to insure adequate competition, it is hoped that at least six, but not more than ten proposals [for the design and construction of the Center] will be submitted.

"2. The University will therefore require a proposal performance bond, in the form of a certified check or bond for the sum of $20,000.00, to be posted by each prequalified DESIGN/BUILD TEAM before a REQUEST FOR DESIGN/BUILD PROPOSALS is issued.

"3. If a DESIGN/BUILD TEAM finds that they cannot prepare an adequate proposal, they should notify the University in writing before 30 June 1971, [2/] in which case the proposal bond or check will be returned.

"4. The proposal bond or check will be returned to the DESIGN/BUILD TEAM if the University receives from it, before 2:00 pm 23 August 1971,[3/] a complete DESIGN/BUILD PROPOSAL. If for any reason a DESIGN/BUILD TEAM fails to submit a proposal before this time (except as specified in paragraph 3 above), the bond or check will be forfeited to the University as liquidated damages." Brochure, § 1A-2 (emphasis supplied).

Charles Pankow, Inc. ("Pankow"), a California contracting firm, requested and received a copy of the Brochure. On June 21, 1971, the University received Pankow's proposal performance bond for $20,000 in which Pankow is described as the principal and defendant Federal Insurance Company, a New Jersey corporation with its principal place of business in New York, as surety. The bond stated in pertinent part:

"... [I]f the said Principal shall notify the University in writing before July 2, 1971, that they [sic] cannot prepare an adequate proposal or shall submit on or before 2 o'clock P.M., August 23, 1971, a complete Design/Build Proposal, then this obligation shall be void; otherwise the bond will be forfeited unto the University of Vermont as liquidated damages."

Pankow received a copy of the Request. Within this same period, nine other groups (including the plaintiffs herein, participating as a joint venture) also met all pre-qualification requirements and each submitted a bond or check to the University in the amount of $20,000.

The Request is a voluminous document. It states, inter alia, that if any DESIGN/BUILD TEAM decided that it could not prepare an adequate proposal, it should notify the University and its $20,000 bond would be returned to it; that any team which intended to remain in the contest should notify the University of its decision to do so before July 2, 1971; and that the bond would thereafter be returned if the University received from the team by September 6, 1971 "a complete DESIGN/BUILD PROPOSAL." Otherwise, the $20,000 bond would be forfeited to the University. It was further stated:

> "It is not the intention of the University to profit from such forfeiture; the money will be used to cover any expenses incurred by the University because of the failure of any DESIGN/BUILD TEAM to submit a complete DESIGN/BUILD PROPOSAL and the remainder distributed among those DESIGN/BUILD TEAMS who have submitted unsuccessful proposals."

Thereafter, six of the nine contestants withdrew from the contest and their bonds were returned to them. The three which elected to continue by July 2, 1971 were Pankow, The Carlson

Corporation ("Carlson") and plaintiffs. The University then informed each of the three teams of the identity of the other two. (Dyson Affid., Exh. 2).

The three contestants submitted their proposals by September 13, 1971. Pankow's proposal was accompanied by a "Letter of Clarification" which noted, inter alia, that the cost of its proposal exceeded the University's budgeted figure of $5,730,000 by $392,000 and that certain portions of the proposal it was submitting were subject to revision. The University's chief financial officer, after having consulted with the University's attorney and an architect who had assisted in preparing the Request, decided that Pankow's proposal was "incomplete". He immediately asked Pankow to either withdraw its Letter or specify by September 15 which portions of the Pankow proposal would be modified so as to meet the $5,730,000 figure. He also stated that, until the University had received a satisfactory response "in writing or by telegram with covering letter", it would consider Pankow's proposal "incomplete".

Pankow responded by a telegram dated September 14, 1971 in which it withdrew its Letter of Clarification but repeated the substance of it and stated which portions of its proposal would be modified so as to meet the budgeted figure. Upon receipt of this telegram, the University's

chief financial officer, attorney and dean met with three architects who were familiar with the Request. They decided that the proposal was still "incomplete". That same day, the University telegrammed Pankow, stating that unless Pankow withdrew both its Letter of Clarification and its telegram by September 15, Pankow's bond for $20,000 would be declared forfeited to the University. The University did not receive a reply from Pankow.

Carlson was awarded a contract by the University to design and build the Center. By letter dated September 23, 1971, and addressed to defendant Federal Insurance Company, the University demanded payment of $20,000. On October 7, 1972, the University assigned to plaintiff any claim the University might have against Pankow and Federal Insurance Company under Pankow's bond.

Plaintiffs,[4/] suing as assignees under Pankow's bond, ask for judgment in the amount of $20,000 plus interest. They claim that Pankow's proposal was incomplete in a number of respects; that the proposals of the other two contestants--plantiffs and Carlson--were complete; that Carlson was awarded a contract by the University but that plaintiffs were not; and that plaintiffs incurred expenses in excess of $40,000 in the preparation of the proposal which they had submitted to the University.

Defendant, in its answer, denied that the Pankow proposal had been "incomplete" and asserted seven affirmative defenses, including the fact that (1) the University itself failed to comply with certain portions of the Request; (2) the University waived any deficiencies in the Pankow proposal; and (3) the bond was an unenforceable penalty and neither the University nor plaintiffs had sustained any injury as a result of the allegedly incomplete proposal.

Under Fed. R. Civ. P. 56(c), a plaintiff is entitled to summary judgment on the issue of liability only when he convinces the court that no genuine issue of material fact exists, none of the defenses asserted against him is legally sufficient and he is entitled to judgment on his claim as a matter of law. When a defendant moves for judgment dismissing the complaint, the motion will be granted if he can establish that at least one legal defense involves no triable issue of fact and constitutes a complete legal defense to the complaint. The Court is of the opinion that there is no triable issue with respect to one of the defenses raised by the defendant--i.e., that the bond under which plaintiffs sue is a penalty rather than a legally enforceable provision for liquidated damages--and that as a matter of law, the defense is sufficient to defeat plaintiffs' claim.

It is well settled that parties to a contract may agree at the time of contracting that the failure of the promisor to perform under the contract will entitle the promisee to claim a specified, or readily ascertainable, amount of damages, thus obviating the need for litigation over, and proof of, damages in the future. See, e.g., Mokar Properties Corp. v. Hall, 6 App. Div. 2d 536, 539, 179 N.Y.S.2d 814, 819 (1st Dep't 1958). The fact that the parties term such an agreement as this one for liquidated damages is not conclusive, however. See, e.g., J. Weinstein & Sons, Inc. v. City of New York, 264 App. Div. 398, 400, 35 N.Y.S.2d 530, 532 (1st Dep't), aff'd, 289 N.Y. 741, 46 N.E.2d 351 (1942); Gitlin v. Schneider, 42 Misc. 2d 230, 238, 247 N.Y.S.2d 779, 788 (Sup. Ct., Queens Co., 1964). The relevant inquiry is whether, at the time of contract, the amount fixed as liquidated damages was a "reasonable forecast of just compensation for the harm that is caused by the breach" and whether "the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation." Restatement, Contracts, § 339. See also Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd., 64 Misc. 2d 894, 900, 315 N.Y.S.2d 897, 904 (Sup. Ct., Westchester Co., 1970), aff'd, 36 App. Div. 2d 582, 318 N.Y.S.2d 924 (2d Dep't 1971). If the amount fixed does not

meet these requirements, then it will be deemed an unenforceable penalty.

As indicated earlier, the Brochure and Pankow's bond defined the provision for forfeiture of $20,000 to the University as one for liquidated damages. Defendant now challenges that characterization, arguing that there is no dispute as to the fact that, at the time Pankow submitted the bond, and on and after July 2, 1971, when Pankow notified the University of its decision to submit a proposal, there was no foreseeable way in which the University could have been damaged by Pankow's failure to submit a complete proposal. Moreover, defendant claims that there is no dispute as to the fact that, even if the University could have been damaged by Pankow's submission of a deficient proposal, there was no way in which the University's damages could have approached $20,000.

Plaintiffs do not dispute these assertions. As stated in the affidavit of Melvin A. Dyson, the University's chief financial officer during the relevant period,

> "It should have been obvious to each prospective contestant that the University could suffer only slight damage if a participant submitted an incomplete proposal." Id. at 5.

Consequently, it would appear that the bond was a penalty because the determination of the amount to be forfeited to the University was not a reasonable forecast of potential

damage to the University. Moreover, there is no claim made that the bond was required because of the difficulty of estimating potential damage to the University.

Plaintiffs seek to counter this conclusion by arguing that the Request and bond created an agreement not only between Pankow and the University, but also between Pankow and the other two contestants to the effect that, if Pankow failed to submit a complete proposal, it would bear a portion of the expenses of that contestant which had submitted a complete proposal but was not awarded the contract. Conceding that Pankow and defendant made no direct contractual commitment with either of the other two contestants, plaintiffs argue that they are third-party beneficiaries whose potential damages should be taken into account in determining whether or not the bond was a reasonable forecast of just compensation for Pankow's failure to submit a complete proposal. They rely upon that provision of the Request, quoted supra, which states that the portion of the forfeited $20,000 not used to cover the University's expenses would be distributed among those contestants who submitted "unsuccessful" proposals and the fact tnat Pankow was apprised of the identity of the other two contestants.

In certain instances, a person not a party to a contract but who would benefit from the promised performance

may seek legal redress against the promisor for failure of performance. To do so, he must establish that the contract upon which he sues was one for the benefit of a third party. Lawrence v. Fox, 20 N.Y. 268 (1859). A contract for the benefit of a third person is one in which the "promisor engages to the promisee to render some performance to a third person...", 2 Williston on Contracts § 347 at 792 (3d ed. 1959), or to render performance to someone else for the benefit of the third party, id. § 356 at 829. Not every third party who might benefit from the promisor's performance, however, has legal recourse against the promisor. The intent to directly benefit such third person must be clearly manifested and one who is merely an "incidental" beneficiary cannot sue the promisor on the contract, id. § 356A at 835-39. See Associated Flour Haulers & Warehousemen, Inc. v. Hoffman, 282 N.Y. 173, 180, 26 N.E.2d 7, 9-10 (1940). For example, where A owes money to C and B promises A to supply A with money, knowing that A will use the money to pay his debt to C, 4 Corbin on Contracts § 779D at 43-44 (1951), or where B promises A to supply A with money, knowing that A will make a gift of the money to C, id. at 48, C has no contractual claim against B. He is merely an incidental beneficiary since performance was to be made to A, the promisee. See, e.g., Tomaso, Feitner & Lane, Inc. v. Brown, 4 N.Y.2d 391,

175 N.Y.S.2d 73, 151 N.E.2d 221 (1958).

There is no dispute over the fact that Pankow's performance--submission of the proposal or the forfeiture of $20,000--was to be rendered to the University rather than to any of the contestants. The relevant language is unambiguous. It was the University which made a separate, conditional undertaking to distribute a portion of the $20,000 to plaintiffs. Plaintiffs are therefore not direct third party beneficiaries. The fact that Pankow was advised of the identity of the other two contestants and was informed that the University planned to distribute a portion of the $20,000 to the unsuccessful contestants is irrelevant. Clearly, then, the $40,000 in expenses incurred by plaintiffs in the preparation of their proposal may not be considered in determining whether the Pankow bond is a penalty or an enforceable provision for liquidated damages.

Ordinarily, when a court determines that the damage provision in a contract is a penalty, the party seeking to recover under the contract must prove his actual damages. See 5 Corbin on Contracts § 1062. Plaintiffs have not put into issue defendant's claim that the University suffered no damages because of the alleged deficiencies in Pankow's proposal. Although plaintiffs themselves may

have suffered damages in excess of $20,000--whether or not the damages resulted from Pankow's submission of a deficient proposal is a separate matter--they cannot recover more than the University would have recovered because, as assignees, they stand in the shoes of the University. Hence, the defense that the bond constitutes an unenforceable penalty constitutes a complete defense to plaintiffs' claim.

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted and plaintiffs' motion is denied in its entirety.

Submit judgment in accordance with this opinion within ten (10) days of the filing of this opinion.

Dated: New York, New York
March 22, 1974

/s/ Charles H. Tenney
U.S.D.J.

OGDEN DEVELOPMENT CORPORATION and
THE DWIGHT BUILDING COMPANY,
Plaintiffs,
-against-
FEDERAL INSURANCE COMPANY,
Defendant.

72 Civ. 5180 (CHT)

FOOTNOTES

1/ To finance construction of the Center, the University proposed to issue revenue bonds. It was contemplated that the fees paid by students at the Center would pay for operating expenses, amortization of the bonds and part of the annual interest cost. The United States Department of Housing and Urban Development and United States Office of Education agreed to make annual grants in amounts sufficient to meet that part of the bond interest which would exceed 3% per annum.

[2/] This date was ultimately changed to July 2, 1971.

[3/] This date was ultimately changed to September 13, 1971.

4/ Plaintiff Ogden Development Corporation is a Delaware corporation with its principal place of business in California and plaintiff The Dwight Building Company is a Connecticut corporation with its principal place of business there.

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

[SAME TITLE] 72 Civil 5180

- x

Plaintiffs, by their attorneys, Royall, Koegel & Wells, complaining of defendant, allege:

1. The jurisdiction of this Court is invoked under section 1332(a)(1) of the Judicial Code [28 U.S.C. § 1332 (a)(1).

2. Plaintiff, Ogden Development Corporation ("Ogden"), is a citizen of the States of Delaware and California. It is incorporated under the laws of Delaware and its principal place of business is at 9200 Sunset Boulevard, Los Angeles, California.

3. Plaintiff, The Dwight Building Company ("Dwight"), is a citizen of the State of Connecticut. It is incorporated under the laws of Connecticut and its principal place of business is at 109 Sanford Street, Hamden, Connecticut.

4. Defendant is a citizen of the States of New York and New Jersey. It is incorporated under the laws

of New Jersey and its principal place of business is at 90 John Street, New York, New York, in the Southern District of New York.

5. The matter in controversy exceeds $10,000 exclusive of interest and costs.

6. On or about June 21, 1971, The University of Vermont ("the University") requested proposals for the design and construction of a so-called living/learning center on land owned by it in the Cities of Burlington and South Burlington, State of Vermont. The University required that anyone intending to submit a proposal first deposit with it either a certified check or a performance bond in the amount of $20,000 as liquidated damages in the event of its failure to submit a complete living/learning center proposal within the time prescribed for such submissions. The request for proposals (the "request") explained the purpose of the bond in the following language:

> "2A-2.03 The Proposal Bond, certified check or cashier's cheque will be returned to the DESIGN/BUILD TEAM if the University receives from it, before 3:00 p.m., 6 September 1971, a complete DESIGN/BUILD PROPOSAL. If for any reason a DESIGN/BUILD TEAM fails to submit a complete proposal before this time (except as specified in paragraph 2A-2.02 above), the bond or cheque will be forfeited to the University.

> It is not the intention of the University to profit from such forfeiture; the money will be used to cover any expenses incurred by the University because of the failure of any DESIGN/BUILD TEAM to submit a complete DESIGN/BUILD PROPOSAL and the remainder distributed among those DESIGN/BUILD TEAMS who have submitted unsuccessful proposals.

7. The request also explained what disposition might be accorded a proposal which was not complete:

> "2A-3.01 The University may consider informal any proposal not prepared and submitted in accordance with the provisions hereof, and may waive any informalities or reject any or all proposals. If in the majority opinion of the Evaluation Committee, any DESIGN/BUILD PROPOSAL is incomplete, that DESIGN/BUILD PROPOSAL will be considered as having not been submitted. Any DESIGN/BUILD PROPOSAL received after the time specified will be considered as having not been submitted."

8. On or about June 18, 1971 Charles Pankow, Inc. ("Pankow"), a California corporation, as principal, and defendant, as surety, filed with the University such a proposal performance bond as their joint and several obligation. The second, third, fourth and fifth pages of Exhibit A hereto annexed constitute a copy thereof.

9. In the request, the University fixed September 7, 1971 as the date on or before which all design/build proposals must be filed with it, but thereafter, by notice

dated August 17, 1971, it extended the filing date to September 13, 1971.

10. Section 3A-1.01 of the request prescribed that a proposal must be presented in three parts, namely, drawings, a model and a written report.

11. On September 13, 1971 Pankow filed with the University its proposal, but the same was incomplete in that it did not comply with the request in the following respects:

(a) Section 4B-1.01 of the request prescribed that the living/learning center must be designed and constructed by the design/build team for the fixed price of $5,730,000, whereas Pankow's proposal stated that its charge would be $6,122,000.

(b) Section 3A-2.01 of the request prescribed that the drawings include, among other things, schematic drawings of structural, mechanical and electrical systems, whereas Pankow's proposal stated that its drawings were not definitive inasmuch as it reserved the right to make revisions in the mechanical, electrical or structural systems and related architectural elements.

(c) Among other things, section 3A-2.01 of the request required the submission of a site plan showing

the location of the buildings in relation to the site lines, in relation to adjacent existing buildings and in relation to existing and new contour lines, whereas Pankow's proposal stated that its site plan and model were not definitive but that changes of grading would later be made therein.

(d) Section 3A-8.01 of the request prescribed that each proposal must contain a cost breakdown coordinated with the specification and coordinated with the colored plans and area calculations to distinguish clearly between the portion of the cost assignable to HUD and that assignable to OE, whereas Pankow's proposal did not contain a cost breakdown of any sort.

(e) Section 4C-1-1.41 of the request provided that at least 50% of the site area should be maintained as open green space, not including parking and access roads, and section 4C-1-5.31 provided that outdoor recreational facilities should be provided for soft ball, touch football and road hockey, whereas defendant's proposal contained substantially less than 50% of the site area as open green space and provided no space for such outdoor recreational facilities.

12. Because of Pankow's failure to comply with the request, the University's evaluation committee deemed

Pankow's proposal to be incomplete and did not evaluate the same.

13. On September 23, 1971 the University notified Pankow in writing that its performance bond had been forfeited and that it expected payment forthwith from Federal Insurance Company, this defendant; but neither Pankow nor this defendant has paid the $20,000 or any part thereof.

14. Only two other design/build proposals were submitted in pursuance to the request, - one by plaintiffs in a joint venture formed for that purpose (Ogden/Dwight) and one by Carlson Corporation of Cochituate, Massachusetts. Plaintiffs' proposal complied in all respects with the request. Both proposals were evaluated by the University's evaluation committee. The committee preferred the Carlson proposal, and the University awarded the contract to Carlson.

15. Plaintiffs incurred expenses in excess of $40,000 in the preparation of the design/build proposal which they submitted.

16. By instrument a copy of which is annexed hereto as Exhibit A, the University has assigned to plaintiffs its claim against Pankow and defendant.

WHEREFORE plaintiffs demand judgment against defendant for $20,000, with interest from September 13, 1971 and the costs and disbursements of this action.

Dated: December 6, 1972.

ROYALL, KOEGEL & WELLS
Attorneys for Plaintiffs

By William W. Owens
William W. Owens,
a partner

Exhibit A Annexed to Complaint

CHARLES PANKOW, INC. ("Pankow"), as principal, and FEDERAL INSURANCE COMPANY ("Federal"), as surety, have heretofore filed with THE UNIVERSITY OF VERMONT ("The University") a proposal performance bond, a copy of which is annexed hereto, as a condition to obtaining permission for Pankow to submit a Design/Build Proposal under The University's Project 73 for a Living/Learning Center. In its request for Design/Build Proposals, The University stated as follows:

"2A-2.03

> The Proposal Bond, certified cheque or cashier's cheque will be returned to the DESIGN/BUILD TEAM if the University receives from it, before 3:00 p.m., 6 September 1971, a complete DESIGN/BUILD PROPOSAL. If for any reason a DESIGN/BUILD TEAM fails to submit a proposal before this time (except as specified in paragraph 2A-2.02 above), the bond or cheque will be forfeited to the University. It is not the intention of the University to profit from such forfeiture; the money will be used to cover any expenses incurred by the University because of the failure of any DESIGN/BUILD TEAM to submit a complete DESIGN/BUILD PROPOSAL and the remainder distributed among those DESIGN/BUILD TEAMS who have submitted unsuccessful proposals."

A joint venture consisting of Ogden Development Corporation and The Dwight Building Company ("Ogden/Dwight") submitted a Design/Build Proposal which was accepted by

The University for further processing. Pankow submitted a Design/Build Proposal which was rejected by The University as incomplete. The contract was awarded to a third design/build team, The Carlson Corporation.

NOW, THEREFORE, The University, in pursuance of a resolution of its board of trustees dated October 7, 1972, hereby assigns and sets over to Ogden/Dwight any claim it may have against Pankow and Federal under the annexed bond.

THE UNIVERSITY OF VERMONT

By /s/ W. C. Patterson
executive vice-president

ATTEST:

/s/ Robert E. Boardman
secretary

STATE OF VERMONT)
: ss.:
COUNTY OF CHITTENDEN)

On this 19th day of October, 1972, before me personally came Wayne C. Patterson, to me known who, being duly sworn, did depose and say that he resides at 1 Barstow Rd., Shelburne, Vermont; that he is executive vice-president of THE UNIVERSITY OF VERMONT, the corporation described in and which executed the above instrument;

that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of trustees of said corporation, and that he signed his name thereto by like order.

/s/ Mary T. Osborne
Notary Public

Exhibit A Annexed to Complaint

FEDERAL INSURANCE COMPANY

3200 Wilshire Blvd.
Los Angeles, California 90010

PROPOSAL PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS, That we, Charles Pankow, Inc., 2476 No. Lake Avenue, Altadena, California 91001, a California corporation, hereinafter called the Principal, as Principal, and Federal Insurance Company, a corporation organized and existing under the laws of the State of New Jersey and having its principal place of business in New York, New York, hereinafter called the Surety, as Surety, are held and firmly bound unto the University of Vermont, Burlington, Vermont, hereinafter called the Obligee, in the penal sum of Twenty thousand and No/100 Dollars ($20,000.00), for the payment of which the Principal and the Surety bind themselves, their heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, That, Whereas the Principal has been pre-qualified as a Design/Build Team for Project 73 Living/Learning Center, Burlington, Vermont, and upon the filing of this bond will be issued a copy of the request for Design/Build Proposals.

Exhibit A Annexed to Complaint

NOW,THEREFORE, if the said Principal shall notify the University in writing before July 2, 1971, that they cannot prepare an adequate proposal or shall submit on or before 2 o'clock P.M., August 23, 1971, a complete Design/Build Proposal, then this obligation shall be void; otherwise the bond will be forfeited unto the University of Vermont as liquidated damages.

Signed, sealed and dated this 18th day of June, 1971.

CHARLES PANKOW, INC.

By /s/ (unintelligible)

FEDERAL INSURANCE COMPANY

By /s/ E. J. Nielsen
E. J. Nielsen
Attorney-in-Fact

The remaining three pages of the exhibit are an acknowledgment by E. J. Nielsen and proofs of his authority to execute undertakings in the name of Federal Insurance Company.

Answer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OGDEN DEVELOPMENT CORPORATION and THE DWIGHT BUILDING COMPANY, Plaintiffs,	:	72 Civ. 5180
-against-	:	Judge Tenney
FEDERAL INSURANCE COMPANY, Defendant.	:	

Defendant Federal Insurance Company, by its attorneys, Hart & Hume, for its answer to the complaint alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "1" through "3" and "14" through "16" of the complaint.

2. Denies each and every allegation contained in paragraphs "6", "7", "9", and "10" of the complaint except admits that on or about June 21, 1971, The University of Vermont issued to certain pre-qualified applicants, including Charles Pankow, Inc. ("Pankow"), a document entitled "University of Vermont, Project 73, Living/Learning Center, Burlington, Vermont, Request for Design/Build

Proposals" and begs leave to refer to said document for the terms thereof.

3. Denies each and every allegation contained in paragraph "8" of the complaint except admits that on or about June 18, 1971, Pankow filed with The University of Vermont Proposal Performance Bond 80421850-F executed by Pankow, as principal, and defendant, as surety, and begs leave to refer to said bond for the terms thereof.

4. Denies each and every allegation contained in paragraph "11" of the complaint except admits that on September 13, 1971, Pankow submitted to The University of Vermont its proposal in response to the request for design/build proposals referred to in paragraph "2" of this answer.

5. Denies each and every allegation contained in paragraphs "12" and "13" of the complaint except (a) admits that on or about September 28, 1971, Pankow received a letter dated September 23, 1971, from Melvin A. Dyson, Vice President for Business and Financial Affairs of The University of Vermont, and begs leave to refer to said letter for the contents thereof and (b) admits that Pankow and defendant have made no payment to The University of Vermont under Proposal Performance Bond 80421850-F.

Answer

FIRST AFFIRMATIVE DEFENSE

6. The aforesaid request for design/build proposals issued by The University of Vermont provided that "The University will evaluate all proposals according to the procedures described in Division 5".

7. Division 5 of the request for design/build proposals contemplated that evaluation of proposals - including the evaluation of the proposals' compliance with the requirements of the request - would be accomplished by an evaluation committee the membership of which was prescribed in said Division 5.

8. The University, in breach of its obligations under the request for design/build proposals, did not submit the proposal of Pankow to the evaluation committee.

9. By reason of the foregoing, The University of Vermont and its assignee are precluded from recovery on Proposal Performance Bond 80421850-F.

SECOND AFFIRMATIVE DEFENSE

10. Repeats and realleges each and every allegation contained in paragraphs "6" and "7" of this answer with the same force and effect as if here fully set forth.

Answer

11. Division 2, Section 2A-3.01 of the request for design/build proposals provided that "... if in the majority opinion of the Evaluation Committee any Design/Build Proposal is incomplete, that Design/Build Proposal will be considered as having not been submitted."

12. At no time did a majority of the evaluation committee determine that the proposal of Pankow was incomplete.

13. By reason of the foregoing, The University of Vermont and its assignee are precluded from recovery on Proposal Performance Bond 80421850-F.

THIRD AFFIRMATIVE DEFENSE

14. The proposal submitted by Pankow on or about September 13, 1971, in response to the aforesaid request for design/build proposals included a "letter of clarification" which referred to various aspects of the proposal.

15. On or about September 13, 1971, The University of Vermont delivered a letter to Pankow which stated, in part, as follows:

> "*** With reference to the Letter of Clarification attached to your proposal to the University of Vermont, we must ask you to either withdraw the Letter of Clarification, or to

> specify exactly which portions of the proposal will be modified or removed to comply with the fixed price of $5,730,000.00. Until either course is chosen by you and explained to us in writing or by telegram with covering letter, we must consider your Proposal to be incomplete ***"

16. Said letter delivered by The University of Vermont to Pankow on or about September 13, 1971, further stated, in part, as follows:

> "Upon first examination of the documents provided by Charles Pankow, Inc., we were unable to find the network and schedule of progress payments required in the Request for Design/Build Proposals. These should be provided as soon as possible."

17. The University of Vermont waived any alleged deficiencies in the proposal of Pankow other than those specified in said letter delivered September 13, 1971, and with respect to those specified alleged deficiencies waived strict compliance with the requirement of the request for design/build proposals that complete proposals be submitted on or before September 13, 1971.

18. By telegram to The University of Vermont transmitted on September 15, 1971, Pankow specified exactly which portions of its proposal were to be modified or removed to comply with the fixed price of $5,730,000.00.

19. On or about September 15, 1971, The University of Vermont, in breach of its obligations under the request for design/build proposals rejected the proposal of Pankow from further consideration.

20. By reason of the foregoing, The University of Vermont and its assignee are precluded from recovery on Proposal Performance Bond 80421850-F.

FOURTH AFFIRMATIVE DEFENSE

21. With reference to the proposal performance bond required of an applicant to qualify to submit a proposal in response to the aforesaid request for design/build proposals, Division 2, Section 2A-2.01 of said request provided, in part, as follows:

> "*** This bond is required to insure that an adequate number of Design/Build Proposals will be submitted to the University, and thereby protect both the University and the Design/Build Teams."

22. The University of Vermont received an adequate number of design/build proposals.

23. By reason of the foregoing, The University of Vermont and its assignee are precluded from recovery on Proposal Performance Bond 80421850-F.

FIFTH AFFIRMATIVE DEFENSE

24. The criteria listed in the request for

design/build proposals constituted suggested minimum standards only.

25. By reason of the foregoing, the proposal of Pankow is not rendered incomplete by virtue of any alleged failure of said proposal to include all of the facilities envisioned in the request for design/build proposals.

SIXTH AFFIRMATIVE DEFENSE

26. The provision of Division 2, Section 2A-2.03 of the request for design/build proposals for forfeiture of the proposal performance bond constitutes an unenforceable penalty.

27. The University of Vermont and/or its assignee have sustained no actual loss or damage as a result of any alleged defect in the proposal of Pankow.

28. By reason of the foregoing, The University of Vermont and its assignee are precluded from recovery on Proposal Performance Bond 80421850-F

SEVENTH AFFIRMATIVE DEFENSE

29. The extension by The University of Vermont of the time for filing of proposals pursuant to the request for design/build proposals, without the consent of

defendant, was such a change in the obligation of Pankow, defendant's principal, as to discharge defendant from all obligations under Proposal Performance Bond 80421850-F.

30. By reason of the foregoing, The University of Vermont and its assignee are precluded from recovery on Proposal Performance Bond 80421850-F.

WHEREFORE, defendant Federal Insurance Company demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

HART & HUME
Attorneys for Defendant

By: s/s William Hart
A Member of The Firm
Office & P. O. Address
10 East 40th Street
New York, N. Y. 10016
Tel.: (212) 686-0920

Plaintiffs' Notice of Motion
for Partial Summary Judgment, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OGDEN DEVELOPMENT CORPORATION and THE DWIGHT BUILDING COMPANY, Plaintiffs, -against- FEDERAL INSURANCE COMPANY, Defendant.	72 Civil 5180 CHT

S I R S :

PLEASE TAKE NOTICE that on the annexed affidavits of Melvin A. Dyson sworn to May 23, 1973, of Charles R. Burd sworn to July 13, 1973, of William W. Owens sworn to July 20, 1973 and of Herbert Roth sworn to July 24, 1973, and on the complaint and answer herein, the undersigned will move before the Honorable Charles H. Tenney at Room 1904, United States Court House, 40 Centre Street, New York, New York, at ten o'clock in the morning on Thursday, August 10, 1973, for summary judgment in favor of plaintiffs, interlocutory in character, pursuant to Rule 56(c) of the Rules of Civil Procedure on the issue of liability alone and determining that plaintiffs

are entitled to final judgment for the lesser of $20,000 and the amounts they expended in preparing their 1971 proposal for the construction of a living/learning center at the University of Vermont or, in the event such motion be denied, an order pursuant to Rule 56(d) specifying the facts which appear without substantial controversy and directing such further proceedings as appear to the Court to be just.

Answering papers, if any, should be served on the undersigned at least three days before the return date.

Dated: July 27, 1973.

Yours, etc.,

ROYALL, KOEGEL & WELLS

By /s/ William W. Owens
A member of the firm

Attorneys for Plaintiffs
200 Park Avenue
New York, New York.
Tel. (212) 972-3963

TO:

HART & HUME, ESQS.
Attorneys for Defendant
10 East 40th Street
New York, New York.

Plaintiffs' Statement Pursuant to
District Court General Rule 9(g)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OGDEN DEVELOPMENT CORPORATION and THE DWIGHT BUILDING COMPANY, Plaintiffs,	:	72 Civil 5180 CHT
-against-	:	
FEDERAL INSURANCE COMPANY, Defendant.	:	

Plaintiffs submit that there is no genuine issue to be tried with respect to the following material facts:

1. This action was commenced on December 7, 1972.

2. On December 7, 1972 plaintiff Ogden Development Corporation ("Ogden") was a Delaware corporation with its principal place of buiness at 9200 Sunset Boulevard, Los Angeles, California.

3. On December 7, 1972 plaintiff The Dwight Building Company ("Dwight") was a Connecticut corporation with its principal place of business at 109 Sanford Street, Hamden, Connecticut.

Plaintiffs' Statement Pursuant to
District Court General Rule 9(g)

4. On December 7, 1972 defendant was a New Jersey corporation with its principal place of business at 90 John Street, New York, New York, in the Southern District of New York.

5. The amount in controversy exceeds $10,000 exclusive of interest and costs.

6. In September 1969 the University of Vermont (the "University") began to experiment with an educational concept under which a fraction of the student body lived and studied apart from the main body. The results seemed to indicate that the student who participated in the program got a better education.

7. In mid-1970 the University resolved to expand the program by housing a larger portion of the student body in a complex known as a "living/learning center" which would be designed and built especially for the program. Most of the educational and living requirements of the student would be met at the center. He would be housed and fed there. He would receive the larger part of his instructions there from resident members of the faculty. He would have his recreational and social facilities there.

8. The University publicized its intention to inaugurate a contest for the design and construction of

the living/learning center in accordance with specifications to be issued by the University and at a price to be prescribed by the University. With the assistance of a Montreal architect it prepared a "Request for Proposals" (the "Request") which specified what a design/build proposal must contain and the fixed price which it must cost.

9. In early 1971 the University issued to anyone evidencing an interest in submitting a design/build proposal a brochure (the "Pre-Qualification Documents") giving a brief explanation of the purpose of the contest and stating what information and other papers a would-be participant must file with the University before he could enter the contest and receive a copy of the Request. One requirement in the Pre-Qualification Documents was the filing of a bond or certified check for $20,000 conditioned on the submission of a complete design/build proposal within a time limit to be specified by the University. In the front of the Pre-Qualification Documents was a letter by a vice-president of the University which said in part:

> "The University proposes to select a single proposal according to quality and design. The cost, therefore, will be fixed in the neighborhood of $5,750,000."

The letter concluded with the statement that the Request would be released on June 21, 1971 only to design/

build teams who had completed the Pre-Qualification Documents and had demonstrated that they could satisfactorily complete a design/build project.

10. After mentioning the proposal performance bond or certified check for $20,000 which must be posted before a design/build team could receive a copy of the Request, the Pre-Qualification Documents said:

> "If a DESIGN/BUILD TEAM finds that they cannot prepare an adequate proposal, they should notify the University in writing before 30 June 1971, in which case the proposal bond or check will be returned."

11. Charles Pankow, Inc. ("Pankow"), a contracting company in Altadena, California, requested and received a copy of the folder entitled "Pre-Qualification Documents". On or about June 21, 1971 the University received Pankow's proposal performance bond. A copy of the bond is annexed to the complaint as part of Exhibit A. The bond is a joint and several obligation for $20,000 in which Pankow is the principal and Federal Insurance Company, the defendant in this action, is the surety. Pankow's copy of the Request was sent to it on June 21, 1971.

12. The Request prescribed what a design/build proposal must contain. It again said that, if any design/build team, after seeing the Request, decided that it could

not prepare a complete proposal, it should notify the University, whereupon its bond or certified check for $20,000 would be returned. The Request also said that any design/build team which intended to continue in the contest should notify the University by registered mail before July 2, 1971 of its decision to continue.

13. The Request explained that the bond or certified check which had been posted by any team which elected to continue in the contest would be returned if the University received from the team by September 6, 1971 a complete design/build proposal; otherwise the $20,000 would be forfeited. The Request explained that:

> "It is not the intention of the University to profit from such forfeiture; the money will be used to cover any expenses incurred by the University because of the failure of any DESIGN/BUILD TEAM to submit a complete DESIGN/BUILD PROPOSAL and the remainder distributed among those DESIGN/BUILD TEAMS who have submitted unsuccessful proposals."

14. Pursuant to the opportunity to withdraw after receiving the Request, six of the nine who had qualified elected to withdraw and receive back the security which they had posted. Three groups elected to continue, - namely, Pankow, the Carlson Corporation and a joint venture of plaintiffs ("Ogden/Dwight"). Under date of July 2,

1971, Pankow wrote the University that it had received its copy of the Request and that it elected to stay in the contest. Under date of July 7, 1971, the University wrote Pankow acknowledging receipt of its letter and informing it that Carlson and Ogden/Dwight were the other contestants which were continuing.

15. The Pre-Qualification Documents had said that design/build proposals would be due on August 23, 1971 but that the University reserved the right to extend the time. The Request prescribed September 6 as the date by which all design/build proposals must be submitted but said that the University reserved the right to extend the time. September 6 was Labor Day, so the three contestants were notified that September 7 would be all right. Thereafter, by telegram dated August 17, each participant was notified that the time had been extended to September 13, 1971.

16. All three contestants submitted their proposals by September 13. Pankow's proposal (drawings, a model and a written report) was submitted at Burlington on September 13 by a messenger who had come from California and who simultaneously delivered a letter from Pankow entitled "Letter of Clarification". Among other things, the letter said that,

Plaintiffs' Statement Pursuant to
District Court General Rule 9(g)

(a) Notwithstanding anything to the contrary in the Request or in Pankow's proposal, Pankow reserved the right not only to revise the mechanical and electrical systems but also the structural systems and related architectural elements in the final working drawings. The Request had prescribed that the drawings submitted must show the structural, mechanical and electrical systems.

(b) Pankow intended to reduce the site work by changing the grading from that shown on the site plan and the model which it was delivering. The Request required the submission of a site plan showing the location of the buildings in relation to the site lines, in relation to adjacent existing buildings and in relation to existing and new contour lines.

(c) Pankow's price was $6,122,000. The Request had prescribed a fixed price of $5,730,000. Pankow's letter said that to meet the University's fixed price of $5,730,000, it would be necessary to make modifications in the proposal which it was submitting.

17. On September 13, 1971 the University gave Pankow's messenger a letter asking Pankow either to withdraw the "Letter of Clarification" or to say exactly what portion of its proposal would be modified or removed to

comply with the fixed price of $5,730,000. The letter said that, until the University had had a satisfactory response, it must consider Pankow's proposal incomplete and ineligible for presentation to the evaluation committee.

18. Pankow responded by a three page telegram dated September 14, 1971 which reiterated what had been said in the Letter of Clarification about the mechanical, electrical and structural systems and the changes of grading. The telegram said that, to meet the University's price of $5,730,000:

> "We further propose to eliminate the living center adjacent to the village center and replace this area by the addition of one floor to each of three of the remaining four living centers."

19. Pankow's telegram of September 14, 1971 did not amend its proposal so as to comply with the Request. There was no model; there were no drawings; there was no layout of the new top floors; and there were no applicable, mechanical, electrical and structural drawings. Moreover, the modification would have violated the Request in that the Request specified that there must be living quarters for approximately 600 undergraduate students, 10 resident faculty and 8 resident graduate students, that

the number of students and faculty members in each housing cluster should not exceed 123 and that there should be at least 5 housing clusters, whereas Pankow proposed to reduce the number of housing clusters to four, which would have required either an average of 150 students to the cluster or only 480 students housed at the center.

20. Upon receipt of Pankow's telegram of September 14, 1971, the University telegraphed Pankow offering it until 8 P.M. on September 15, 1971 to withdraw its Letter of Clarification and its telegram of September 14. In the telegram the University advised Pankow that otherwise its $20,000 would be forfeited.

21. Pankow did not withdraw its Letter of Clarification and its telegram and made no effort to comply with the Request.

22. On September 23, 1971 the University wrote Pankow demanding payment of $20,000 under the bond. Pankow did not respond.

23. Carlson and Ogden/Dwight submitted their proposals by September 13, 1971. Their proposals complied with the Request. The University preferred the Carlson proposal and awarded Carlson the contract. Thereafter

the University assigned to Ogden/Dwight its claim under the proposal performance bond filed by Pankow and defendant.

/s/ William W. Owens

Affidavit of Melvin A. Dyson
in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

OGDEN DEVELOPMENT CORPORATION and THE DWIGHT BUILDING COMPANY,

Plaintiffs,

-against-

FEDERAL INSURANCE COMPANY,

Defendant.

72 Civil 5180 CHT

-- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MELVIN A. DYSON, being duly sworn, deposes and says:

From September 1, 1961 to September 30, 1972 I was Chief Financial Officer of the University of Vermont (the "University"). The matters hereinafter related are of my own knowledge.

Beginning in September 1969 the University had been experimenting with an educational concept under which a fraction of the student body lived and studied separate from the main body of students. The University found that the student in this group became more involved in the

academic program, seemed to be better satisfied with his studies, was better motivated by frequent contact with the faculty and with other students in the program and was seemingly better educated. In 1970 the University decided to expand the program by housing a larger fraction of the student body in a complex of buildings - a "living/learning center" - designed and built especially for this program. Most of their educational and living requirements would be met at the center. They would be housed and fed there. They would receive the larger part of their instruction there from resident members of the faculty. They would have their own recreational and social facilities.

To finance the construction and landscaping of the complex, the University proposed to issue revenue bonds. The fees paid by students were to pay the operating expenses, to amortize the bonds and to meet part of the annual interest. The University made arrangements for interest subsidy grants under the College Housing Program of the United States Department of Housing and Urban Development ("HUD") and under the Bureau of Higher Education Program of the United States Office of Education ("OE") in amounts sufficient to meet that part of

the interest on the revenue bonds which would exceed three percent per annum.

In mid-1970 the University, partly by written announcements to a list of contractors, engineers and architects, publicized its intention to use the design/build concept on a competitive basis to design and construct the living/learning center in accordance with specifications to be issued by the University and at a fixed price to be dictated by the University. On September 25, 1970 there was a meeting in Burlington, Vermont, for those who might be interested in listening to the competitive concept of the design/build approach to construction at a pre-determined price. About forty persons attended. The meeting was addressed by me, by an individual from the Washington office of HUD, by an engineer from the Boston office of OE and by Mr. George Buchanan from the Educational Facilities Laboratory in New York City. I said that at a later date the University would issue a request for proposals (the "Request"). After the meeting, the Educational Facilities Laboratory awarded the University $12,000 to develop the concept, whereupon the University retained Philip Bobrow, a Montreal architect, to assist in preparing the Request.

Then we issued to each group so requesting a brochure giving a brief explanation and containing the pre-qualification documents which a would-be participant must file before he could receive the Request. This brochure and the accompanying documents, which I shall term the "Pre-Qualification Documents", will, I am told, be filed with the Court at the hearing of this motion. The Court will note that one requirement was the filing of a bond (p. 1A-1) and that, among other things, my letter in the front of the Pre-Qualification Brochure said (page 1):

> "The University proposes to select a single proposal according to quality and design; the cost, therefore, will be fixed and in the neighborhood of $5,750,000."

The final sentence of the letter said (p. 2):

> "Request for Design/Build Proposals will be released, on 21 June, 1971 ONLY to those respective DESIGN/BUILD TEAMS who have completed these documents, and who have demonstrated, in their response, that they can satisfactorily complete the project."

After mentioning the performance bond or certified check for $20,000 before a Request could be issued (p. 1A-1), the Pre-Qualification Brochure said (p. 1A-1):

> "If a DESIGN/BUILD TEAM finds that they cannot prepare an adequate proposal, they should notify the University in writing before 30 June 1971, in which case the proposal bond or check will be returned."

Affidavit of Melvin A. Dyson
in Support of Plaintiffs' Motion

Charles Pankow, Inc. ("Pankow"), a contracting company in Altadena, California, received a copy of the Pre-Qualification Brochure; and on or about June 21, 1971 the University received Pankow's bond, a copy of which is annexed to the complaint in this action as part of Exhibit A. The Court will note that it is a joint and several obligation in which Pankow is described as the principal and Federal Insurance Company, this defendant, as the surety.

Nine groups qualified. Eight posted bonds for $20,000 and one posted a bank cashier's check for $20,000. As the security for performance was received and the other qualification documents were found to be in order, I sent the Request to the group so filing. Pankow's copy of the Request was sent to it on June 21, 1971. The identical Request was sent to each group. I understand that on the hearing of this motion the plaintiffs will file their copy of the Request.

The Court will find that the Request was in fact a voluminous document prescribing those things with which a design/build proposal must conform. Among other things, it again said that, if any design/build team decided that it could not prepare an adequate proposal, it

should notify the University by a certain time, whereupon its bond or check for $20,000 would be returned (p. 2A-2). It also said that any team which intended to continue should notify the University before July 2, 1971 of its intention to submit a proposal (p. 2A-2).

The Request explained that the bond or check of any design/build team which elected to continue would be returned to the team if the University received from it before September 7, 1971 a complete design/build proposal; otherwise the $20,000 would be forfeited (p. 2A-2). The Request went on to explain that (p. 2A-2):

> "It is not the intention of the University to profit from said forfeiture; the money will be used to cover any expenses incurred by the University because of the failure of any DESIGN/BUILD TEAM to submit a complete DESIGN/BUILD PROPOSAL and the remainder distributed among those DESIGN/BUILD TEAMS who have submitted unsuccessful proposals."

By "unsuccessful proposals" we meant proposals which conformed to the Request but which had not resulted in the award of the contract.

We wanted the design/build teams to know that the University intended to carry out in good faith the University's part of the bargain. It was not going to award the contract to a team which had failed to comply

with the Request. It should have been obvious to each prospective contestant that the University could suffer only slight damage if a participant submitted an incomplete proposal. Thus we held out to those who participated in good faith not only the assurance that the University would not award the contract to a design/build team which failed to comply but also the assurance that, if anyone in the contest failed to comply, those who had complied but had not been awarded the contract would receive some reimbursement of the expenses which they had incurred in complying. In a real sense this was a contract not only between the University and the contestant but also between each contestant and all other contestants that he would either comply with the Request or bear part of the expenses of those who did comply but did not get the contract.

Pursuant to the opportunity afforded to withdraw after receiving the Request, six of the nine who had qualified withdrew. The University returned their $20,000 performance bonds to five who had filed such bonds and the $20,000 cashier's check to the sixth.

Three elected to continue. They were Ogden/Dwight (plaintiffs' joint venture), Pankow (the corporation in behalf of which the defendant issued the bond here sued

upon), and The Carlson Corporation (of Cochituate, Massachusetts). We received from Pankow a letter (Exhibit 1 annexed hereto) dated July 2, 1971 saying it had received its copy of the Request and that it elected to stay in the contest. I replied under date of July 7 (Exhibit 2). In my reply, I informed Pankow of the identity of the other two groups (Ogden/Dwight and Carlson) who were continuing.

The Court will note that the body of the Request prescribed September 6 as the date by which all proposals must be submitted. September 6 was Labor Day, so we notified the groups that September 7 would be all right. Thereafter, by telegram dated August 17 to each of the three participants, the University extended the time to September 13, 1971.

All three participants submitted their proposals by September 13. The Ogden/Dwight and Carlson proposals complied with the Request and were therefore submitted for evaluation by the University's evaluating committee consisting of nine members.

The Request had provided that the proposal be in three parts, namely, - drawings, a model and a written report (p. 3A-1). There were to be ten sets of the drawings and ten sets of the written report (3A-1).

Pankow's proposal - the drawings, the model and the written report - was delivered to my office in Burlington on September 13 by a messenger who had come from California. Compared with the reports submitted by the other two, the Pankow written report was surprisingly thin, but what attracted my immediate attention was a letter from Pankow which the messenger delivered to me with the proposal. The letter (Exhibit 3) was dated September 13, 1971 and was entitled "Letter of Clarification".

The second paragraph said that, notwithstanding anything to the contrary in the Request or in Pankow's proposal, Pankow reserved the right to revise not only the mechanical and electrical systems but also the "structural systems and related architectural elements in the final working drawings." This was followed by a statement that the revisions "would maintain the respective design criteria and the architectural character of the project." The Request had clearly prescribed (pp. 3A-1 and 2) that the drawings must show the structural, mechanical and electrical systems. Pankow reserved the right to revise them so long as the revisions maintained what it called "design criteria" and "architectural character".

In the third paragraph of the letter, Pankow said that it was going to reduce the site work by changing the grading from that shown on the site plan and the model which it was delivering. The Request had required the submission of a site plan showing the location of the buildings in relation to the site lines, in relation to adjacent existing buildings and in relation to existing and new contour lines (p. 3A-1). Pankow was saying that it would not be bound by what it had submitted. It contemplated some changes.

Then Pankow told me on page 2 of Exhibit 3 that our recommended minimum area of approximately 180,000 square feet was inadequate and that it would have to construct 220,000 square feet to provide the necessary facilities. This, according to Pankow, meant "built-in substantial costs which were not anticipated in making our initial submittals." Therefore, said Pankow, its proposal would cost the University $6,122,000, not the fixed price of $5,730,000 which was plainly prescribed by the Request (pp. 1B-2 and 4B-1). It added, however (Exhibit 3):

> "Therefore, in order to comply with your budget of $5,730,000 it would be necessary for us to make whatever modifications are acceptable to you -- which will amount to approximately $392,000."

Pankow's proposal was so uninformative as to what it would do for $5,730,000 that, after meeting with the attorney for the University and with Philip Bobrow, who was one of the professional architects on the evaluation committee, I gave Pankow's messenger at Burlington Airport on the same day a letter to Pankow (Exhibit 4) asking it either to withdraw the Letter of Clarification or to specify exactly what portions of its proposal would be modified or removed to comply with the fixed price of $5,730,000. The next day I sent Pankow a copy of the letter by certified mail. The letter, the Court will note, said that, until we had had a satisfactory response, we must consider Pankow's proposal incomplete and ineligible for presentation to the evaluation committee.

That brought forth a three page telegram from Pankow, dated September 14 (Exhibit 5). The paragraphs of the telegram which are numbered 2 and 3 were but a reiteration of what had been said in the Letter of Clarification (Exhibit 3) about the mechanical, electrical and structural systems and the change of grade. Then there was a statement that Pankow proposed to change the public corridor widths in the living centers to four feet minimum and in the individual apartments to three feet minimum.

Then followed a clause numbered 5 about painting the interior concrete. Then came a statement that to meet our price of $5,730,000:

> "We further propose to eliminate the living center adjacent to the village center and replace this area by the addition of one floor to each of three of the remaining four living centers."

This of course entailed a drastic change from the drawings and the model which had been submitted. There was no model, there were no drawings, there was no layout of the new top floors, there were no applicable mechanical, electrical and structural drawings, and so on.

But the modification would have violated the Request even if those details had been supplied. The Request specified that there must be living quarters for approximately six hundred undergraduate students, ten resident faculty and eight resident graduate students (p. 1B-1), that the number of students and faculty members in each housing cluster should not exceed 123 (p. 4C-3-2) and that "there should therefore be at least 5 Housing Clusters" (p. 4C-3-2). To reduce the price to $5,730,000, Pankow proposed to reduce the number of housing clusters to four, which meant either that there be an average of 150 students to the cluster or that there be only 480 students housed at the center.

Upon receipt of that telegram, I met with Dean Richard Powers (the chairman of the evaluation committee), Robert Eastman, Esq. (the University's attorney), Philip Bobrow, Herbert Swinburne and Richard Weiman (the three professional architects who were on the evaluation committee). It was the opinion of the architects that the Pankow proposal, as amended, could not be evaluated and that moreover, it did not comply with the specifications in the Request. I thereupon responded with a telegram (Exhibit 6) offering Pankow until 8 P.M., September 15, to withdraw the so-called Letter of Clarification and the telegram. I said that, if this was not done, the $20,000 would be forfeited.

At 10:15 P.M. on September 16 I received over the telephone from Western Union a telegram from one Arthur Bohnert, Jr. of San Francisco which stated that he was attorney for Charles Pankow and continued as follows:

> "In accordance with your invitation and subsequent clarification for design/build proposal, we have submitted our proposal with clarification as requested by you."

The evaluation committee could not and did not evaluate Pankow's proposal. It found the Ogden/Dwight

and the Carlson proposals satisfactory, but it preferred the Carlson proposal. The University awarded the contract to Carlson and returned to Carlson and Ogden/Dwight the bonds which they had filed.

On September 23, 1971 I wrote Pankow demanding payment under the bond (Exhibit 7). There has been no response.

Sworn to by Melvin A. Dyson on May 23, 1973.

Exhibit 1 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

Letterhead of Charles Pankow, Inc., Builders
2476 North Lake Avenue
Altadena, California

July 2, 1971

The University of Vermont
Office of the Vice President for Financial Affairs
Waterman Building
Burlington, Vermont 05401

Attn: Mr. Melvin A. Dyson

Dear Mr. Dyson:

After reviewing the Design/Build Proposal for Project 73, it is our decision that we will submit a proposal on or before September 6, 1971.

Please notify me as soon as possible if we are to proceed.

Sincerely yours,

CHARLES PANKOW, INC.

/s/ Charles H. Niles
Charles H. Niles
Project Director

CHN/gs

CERTIFIED/RETURN RECEIPT REQUESTED

Exhibit 2 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

Letterhead of University of Vermont
Burlington, Vermont

July 7, 1971

Mr. Charles H. Niles
Project Manager
Charles Pankow, Inc.
2476 N. Lake Avenue
Altadena, California 91001

Re: Living and Learning Center

Dear Mr. Niles:

Per our telephone conversation of July 6, we are pleased to notify you that we have received your letter of intention to prepare a Design/Build Proposal and this will serve to notify you to begin work.

Two firms other than yourself have indicated their intention to submit proposals. These are:

The Carlson Corporation
321 Commonwealth Road
Cochituate, Massachusetts 01778

Ogden Development Corporation - Dwight
521 Fifth Avenue
New York, New York 10017

I have enclosed the following documents for your information:

a) site description - utilities
b) boring log and plan of boring locations

Exhibit 2 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

c) building standards for the handicapped (this is merely sent along as an information guideline)

Please note that all inquiries must be directed to my office. No other individual in the University or member of the consulting firm should be contacted. Any further information or addenda concerning the Living and Learning Center will be issued from my office.

Please note that the Design/Build Proposal is to be in my office before 3:00 P.M., September 6, 1971.

I look forward to receiving your proposal and to working with your firm.

Sincerely yours,

Melvin A. Dyson, Vice President
for Business & Financial Affairs

Enclosures

lmc

(Dictated by Peter Lanken)

Exhibit 3 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

Letterhead of Charles Pankow, Inc., Builders
2476 North Lake Avenue
Altadena, California

September 13, 1971

LETTER OF CLARIFICATION

Mr. Melvin A. Dyson, Vice President
for Business and Financial Affairs
Waterman Building
University of Vermont
Burlington, Vermont

Re: PROPOSAL FOR PROJECT 73, LIVING/LEARNING CENTER

Dear Mr. Dyson:

Under separate cover we are conveying to you our Proposal for the Living/Learning Center at Burlington, Vermont, including plans, specifications, model, etc.

We wish to bring to your attention, notwithstanding anything to the contrary that may be contained in either the request for proposal documents or the proposal package, Charles Pankow, Inc. reserves the right to make revisions to the mechanical, electrical or structural systems and related architectural elements in the final working drawings. Such revisions would maintain the respective design criteria and the architectural character of the project.

Our proposal also contemplates the reduction of site work including but not necessarily limited to the reduction of retaining walls, paved areas, tree wells, and other amenities in excess of grading and grassing by approximately fifty percent (50%). This will be accomplished by changing

Exhibit 3 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

the grading from that indicated both on our site plan and illustrated by the model. This is a necessary adjustment to our proposal because of the overlapping time requirements involving design, quantity surveying and estimating of construction cost. We feel that this will also improve the project by reducing substantially the up and down travel for physically handicapped students.

The revisions as listed above would be made at no change in contract price. Revisions, other than these, which alter the requirements or change the scope of the work as may be requested by Owner can be negotiated between the Owner and the Design/Build team as allowed for in the Request for Proposal Documents.

In addition to the above modifications to our proposal, we wish to bring to your attention the fact that the recommended minimum areas of approximately 180,000 sq.ft. provided to us by you in your design criteria has proven to be inadequate in all of the design studies we have been able to make. As a consequence, our best efforts require us to construct approximately 220,000 sq.ft. in order to provide the facilities you indicated could be built within approximately 180,000 sq.ft. This represents an increase in total area in excess of twenty percent (20%) and as such, has built-in substantial costs which were not anticipated in making our initial submittals.

Therefore, in order to comply with your budget of $5,730,000.00 it would be necessary for us to make whatever modifications are acceptable to you -- which will amount to approximately $392,000.00.

Because of restrictions on our insurance coverage for activities involving pure contracting, it will be necessary, if our Proposal is accepted by you, for us to enter into two agreements; one for construction, and one for design.

Exhibit 3 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

We feel that our design team has come up with an outstanding solution for the project and we will welcome the opportunity to answer any questions the evaluation committee may have.

Yours very truly,

CHARLES PANKOW, INC.

/s/ R. J. Osterman
R. J. Osterman

RJO:s

Exhibit 4 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

Letterhead of University of Vermont
Burlington, Vermont

September 13, 1971

Mr. Charles H. Niles
Project Director
Charles Pankow, Inc.
2476 North Lake Avenue
Altadena, California 91001

Re: Living and Learning Center

Dear Mr. Niles:

With reference to the Letter of Clarification attached to your Proposal to the University of Vermont, we must ask you to either withdraw the Letter of Clarification, or specify exactly which portions of the Proposal will be modified or removed to comply with the fixed price of $5,730,000.00. Until either course is chosen by you and explained to us, in writing or by telegram with covering letter, we must consider your Proposal to be incomplete and ineligible for presentation to the Evaluation Committee.

Because evaluation will begin at 9:00 A.M., Wednesday, September 15, 1971, we require an answer to the letter by that time.

There is no reason that we cannot enter into two agreements with you, providing that these agreements are acceptable to the University's counsel.

Exhibit 4 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

Upon first examination of the documents provided by Charles Pankow, Inc., we were unable to find the network and schedule of progress payments required in the Request for Design/Build Proposals. These should be provided as soon as possible.

Sincerely yours,

Melvin A. Dyson, Vice President
for Business & Financial Affairs

lmc

One copy hand-delivered to Burlington Intl. Airport 9/13/71
One copy mailed via certified mail 9/14/71.

Exhibit 5 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

Western Union Telegram

WUA017 SPE054 LB063 L PNA288 SP LONG PDB
PASADENA CALIF 14 833P PDT
MR. MELVIN A DYSON, VICE PRESIDENT FOR BUSINESS AND
FINANCIAL AFFAIRS FONE BEFORE 9AM
WATERMAN BLDG UNIVERSITY OF VERMONT BURLINGTON
VT
RE: PROPOSAL FOR PROJECT 73, LIVING/LEARNING CENTER

DEAR MR. DYSON: 1. PLEASE VOID OUR LETTER
OF CLARIFICATION DATED SEPT 13, 1971 AND SUBSTITUTE
THE FOLLOWING
2. WE WISH TO BRING TO YOUR ATTENTION, NOTWITHSTANDING
ANYTHING TO THE CONTRARY THAT MAY BE CONTAINED IN
EITHER THE REQUEST FOR PROPOSAL DOCUMENTS OF THE
PROPOSAL PACKAGE, CHARLES PANKOW, INC. RESERVES
THE RIGHT TO MAKE REVISIONS TO THE MECHANICAL,
ELECTRICAL OR STRUCTURAL SYSTEMS AND RELATED ARCHITECTURAL

ELEMENTS IN THE FINAL WORKING DRAWINGS. SUCH REVISIONS WOULD MAINTAIN THE RESPECTIVE DESIGN CITERIA AND THE ARCHITECTURAL CHARACTER OF THE PROJECT.

3. OUR PROPOSAL ALSO CONTEMPLATES THE REDUCTION OF SITE WORK INCLUDING BUT NOT NECESSARILY LIMITED TO THE REDUCTION OF RETAINING WALLS, PAVED AREAS, TREE WELLS, AND OTHER AMENITIES IN EXCESS OF GRADING AND GRASSING BY APPRXIMATELY FIFTY PERCENT (50-0/0). THIS WILL BE ACCOMPLISHED BY CHANGING THE GRADING FROM THAT INDICATED BOTH ON OUR SIET PLAN AND ILLUSTRATED BY THE MODEL. THIS IS A NECESSARY ADJUSTMENT TO OUR PROPOSAL BECAUSE OF THE OVERLAPPING TIME REQUIREMENTS INVOLVING DESIGN, QUANTITY SURVEYING AND ESTIMATING OF CONSTRUCTION COST. WE FEEL THAT THIS WILL ALSO IMPROVE THE PROJECT BY REDUCING SUBSTANTIALLY THE UP AND DOWN TRAVEL FOR PHYSICALLY HANDICAPPED STUDENTS.

4. WE PRPOSE TO CHANGE THE CORRIDOR WIDTHS IN THE LIVING CENTERS TO 4' MINIMUM FOR THE PUBLIC CORRIDORS AND TO 3' MIN FOR CORRIDORS WITH IN THE INDIVIDUAL APARTMENTS.

5. PAINTING OF INTERIOR CONCRETE IN THE LIVING LEARNING CENTER.

WE FURTHER PROPSE TO ELIMINATE THE LIVING CENTER ADJACENT TO THE VILLAGE CENTER AND REPLACE THIS AREA BY THE ADDITION OF ONE FLOOR TO EACH OF THREE OF THE REMAINING FOUR LIVING CENTERS

7 THE REVISIONS AS LISTED ABOVE WOULD BE MADE AT NO CHANGE IN CONTRACT PRICE. REVISIONS, OTHER THAN THESE, WHICH ALTER THE REQUIREMENTS OR CHANGE THE SCOPE OF THE WORK AS MAY BE REQUESTED BY OWNER CAN BE NEGOTIATED BETWEEN THE OWNER AND THE DESIGN/BUILD TEAM AS ALLOWED FOR IN THE REQUEST FOR PROPOSAL DOCUMENTS.

8. BECAUSE OF RESTRICTIONS ON OUR INSURANCE COVERAGE FOR ACTIVIES INVOLVING PURE CONTRACTING, IT WILL BE NECARY, IF OUR PROPOSAL IS ACCEPTED BY YOU, FOR US TO ENTER INTO TWO AGREEMENTS ; ONE FOR CONSTRUCTION, AND ONE FOR DESIGN.

9. TIME HAS BEEN A PROBLEM AND WE FEEL THAT WIDTH FOR THE STUDY THERE COULD BE SOME REVISIONS TO THE ABOVE REVISIONS BUT IN ORDER TO MEET THE DEADLINE WE SUBMIT THESE AS STATED

YOURS VERY TRULEY CHARLES PANKOW INC R J OSTEMAN

1. 13 1971 2 3 50-0/0 4 4' 3' 5 6 INSERT IN PARA AFTER 5 AS PARA 6. REPEAT 6. 7 8.9

603A CDT SEP 15 71

Exhibit 6 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

Western Union Telegram

B1A028 CM PD=BURLINGTON VT 15 1246P EDT=

CHARLES NILES, CHARLES PANKOW, INC=

2476 NORTH LAKE AVE ALTEDENA, CALIF 91001=

DEAR MR NILES,PROCEEDING UNDER SFC 2A-11.01 AND OTHERS, WE ACKNOWLEDGE RECEIPT OF YOUR TELEGRAM 603A CDT DATED SEPTEMBER 15, 1971. WE ACKNOWLEDGE YOUR VOIDING YOUR LETTER OF CLARIFICATION DATED SEPTEMBER 13, 1971. HOWEVER, OUR LETTER ADDRESSED TO MR. NILES AND HAND-DELIVERED AT THE BURLINGTON AIRPORT STILL IS APPLICABLE AND, THEREFORE, WE CANNOT ACCEPT THE SUBSTITUTIONS #2-#9 MENTIONED IN THE ABOVE TELEGRAM. WE OFFER YOU UNTIL 8 P.M. EASTERN STANDARD TIME SEPTEMBER 15 THE OPPORTUNITY TO WITHDRAW ALL POINTS MENTIONED IN YOUR LETTER OF CLARIFICATION DATED SEPTEMBER 13, 1971 AND AFOREMENTIONED TELEGRAM. IF YOU DO NOT MEET THIS REQUIREMENT, THEN AS PROVIDED UNDER SECTION 2A-3.01 THE UNIVERSITY WILL REVOKE YOUR PROPOSAL AND AS SPECIFIED UNDER SECTION 2A-2.03 THE

Exhibit 6 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

SECURITY IN THE AMOUNT OF $20,000 YOU HAVE SUBMITTED IS DECLARED FORFEITED TO THE UNIVERSITY. YOU MAY ADDRESS YOUR REPLY TO ME BY TELEPHONE WITH CONFIRMATION BY TELEGRAM AT THE UNIVERSITY OF VERMONT, WATERMAN BUILDING, BURLINGTON, VERMONT. TELEPHONE (802) 656-3296=

MELVIN A DYSON, VICE PRESIDENT

FOR BUSINESS AND FINANCIAL AFFAIRS==

Exhibit 7 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

Letterhead of University of Vermont
Burlington, Vermont

September 23, 1971

Mr. Charles H. Niles
Project Director
Charles Pankow, Inc.
2476 North Lake Avenue
Altadena, California 91001

Dear Charles:

In accordance with the provisions of the Proposal Performance Bond, we hereby confirm our notification to you that the Bond has been forfeited to the University of Vermont. Therefore, we will expect payment forthwith from the Federal Insurance Company.

Will you proceed to accomplish this and acknowledge to us that you are doing the same.

Sincerely yours,

Melvin A. Dyson, Vice President
for Business & Financial Affairs

MAD/lmc

Exhibit 8 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

This is a brochure in brown paper back issued by the University of Vermont and entitled "Pre-Qualification Documents". As reproduction is difficult, it may be found in the record on appeal.

Exhibit 9 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

This is a thick brochure in brown paper back issued by the University of Vermont and entitled "Request for Design/Build Proposals". It is so voluminous that reproduction is impractical. It may be found in the record on appeal.

Exhibit 10 Annexed to Dyson Affidavit
In Support of Plaintiffs' Motion

This is a document in a black loose-leaf folder entitled on the first page "Proposal to the University of Vermont" and bearing the endorsement

"Design-Build Team

Charles Pankow, Inc., 2476 N. Lake Avenue, Altadena, Ca.
Builders

Consultants Network, Inc., 1224 N. Broadway, Santa Ana, Ca.
Architects & Engineers"

It is so voluminous that reproduction is impractical.

It may be found in the record on appeal.

Affidavit of William W. Owens Dated 7/20/73
In Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

[SAME TITLE] 72 Civil 5180 CHT

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM W. OWENS, being duly sworn, deposes and says:

I am a member of the firm of Royall, Koegel & Wells, attorneys for plaintiffs in the above entitled action, and have had charge of its prosecution from its inception. I make this affidavit in support of plaintiffs' motion for summary judgment interlocutory in character which is intended to dispose of all issues in the action except the amount of plaintiffs' damages.

This action was commenced by the filing of the complaint on December 7, 1972. The summons and complaint were served on December 7, 1972. The answer was served on February 5, 1973. There have been no proceedings since service of the answer.

Affidavit of William W. Owens Dated 7/20/73
In Support of Plaintiffs' Motion

The moving affidavit by Melvin A. Dyson to which this affidavit is annexed mentions a brochure entitled "Pre-Qualification Documents" issued by the University of Vermont (the "University"). I have labeled that brochure as Exhibit 8. It will be filed as a separate paper on this motion.

Then the Dyson affidavit mentions the University's "Request for Proposals". I am filing that as a separate document, Exhibit 9.

Finally, the Dyson affidavit mentions a written report filed with the University by Charles Pankow, Inc. as part of Pankow's proposal for a living/learning center. I am filing that as a separate document, Exhibit 10.

Sworn to by William W. Owens on July 20, 1973.

Affidavit of Charles R. Burd
In Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

[SAME TITLE] 72 Civil 5180 CHT

- x

STATE OF CONNECTICUT)
: ss.:
COUNTY OF NEW HAVEN)

CHARLES R. BURD, being duly sworn, deposes and says:

I am the president of The Dwight Building Company ("Dwight"), one of the plaintiffs in this action. I make this affidavit in support of plaintiffs' motion for partial summary judgment.

Dwight was organized more than fifty years ago under the laws of Connecticut and it is, and on December 7, 1972 was, engaged in general construction work. It has always been a Connecticut corporation.

On and since December 7, 1972 and for some years prior thereto Dwight's principal place of business has been located at 109 Sanford Street, Hamden, Connecticut. Its officers and all its permanent employees have

their headquarters at that address. All estimating, bidding and contracting are handled at that office and all permanent financial and job progress records are maintained there. Its only other places of business are temporary job offices maintained at construction sites to supervise the work being done at such sites. The job office exists only while the work is in progress and usually consists of a trailer or mobile home type of building which is wheeled away when the job is finished.

Sworn to by Charles R. Burd on July 13, 1973.

Affidavit of Herbert Roth
In Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

[SAME TITLE] 72 Civil 5180 CHT

- x

STATE OF CALIFORNIA)
: ss.:
COUNTY OF LOS ANGELES)

HERBERT ROTH, being duly sworn, deposes and says:

I am vice-president and general counsel for Ogden Development Corporation ("Ogden"). I make this affidavit in support of plaintiffs' motion for partial summary judgment.

Ogden was organized on January 5, 1968 under the laws of the State of Delaware. It has always been a Delaware corporation. It is, and on December 7, 1972 was, engaged in the development of commercial structures such as office buildings, retail shopping centers and educational facilities, and in the ownership and operation of commercial structures.

On and since December 7, 1972 and at all times prior thereto Ogden's principal place of business has

been located at 9200/9220 Sunset Boulevard, Los Angeles, California. Most of its officers and forty-seven permanent employees have their headquarters at that address. All building management and real estate investment are handled at that office and all financial and other permanent records are maintained there. Ogden has only two employees in the State of New York. One of the two is but a part time employee. On December 7, 1972 it had three employees in the State of New York.

Sworn to by Herbert Roth on July 24, 1973.

Defendant's Notice of Cross-Motion
For Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

[SAME TITLE] 72 Civil 5180
(Judge Tenney)

- x

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of R. J. Osterman sworn to September 18, 1973, with exhibits annexed, the annexed affidavit of Cecil Holland, Jr. sworn to September 24, 1973, and all prior pleadings and proceedings had herein, and upon the motion of plaintiffs for summary judgment pursuant to F.R.Civ. P.56(c) now returnable before the Hon. Charles H. Tenney, United States District Judge, at Room 1904, United States Court House, Foley Square, New York, New York at 10:00 o'clock in the morning on October 5, 1973, the defendant will cross-move at the hearing of plaintiffs' motion for summary judgment pursuant to F. R. Civ. P. 56(b) dismissing the complaint upon the following grounds with respect to which there is no genuine issue as to any material fact: (a) that the forfeiture sought by plaintiffs of the amount of the Proposal Performance Bond sued upon constitutes an

unenforceable penalty; (b) that plaintiffs' assignor waived the deficiencies, if any, in the design/build proposal in connection with which said Proposal Performance Bond was issued thereby precluding recovery on said bond; and (c) that the breach by plaintiffs' assignor of its obligation to submit said design/build proposal to the Evaluation Committee precludes recovery on the Proposal Performance Bond.

Answering papers, if any, to this cross-motion should be served upon the undersigned at least three days before the return date.

Dated: New York, New York
September 24, 1973

Yours, etc.

HART & HUME
Attorneys for Defendant

By: /s/ Eugene F. Brady
A Member of the Firm
10 East 40th Street
New York, New York 10016
Telephone: (212) 686-0920

TO: ROYALL, KOEGEL & WELLS, ESQS.
Attorneys for Plaintiffs
200 Park Avenue
New York, New York 10017

Defendant's Statement Pursuant to
District Court General Rule 9(g)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

[SAME TITLE]

72 Civ. 5180
(Judge Tenney)

- x

I. With respect to plaintiffs' motion for summary judgment, plaintiffs' "Statement Pursuant to Rule 9(g)" contains several statements (paras. 8 through 10, 12, 13, 15 and 16, and 19) which mix facts with characterizations of the contents and legal effect of various documents which are involved in this litigation, namely the Pre-Qualification Documents and the Request for Design/Build Proposals ("the Request") issued by plaintiffs' assignor, The University of Vermont ("the University"), the Proposal Performance Bond delivered to the University by Charles Pankow, Inc. ("Pankow"), as principal, and defendant Federal Insurance Company ("Federal"), as surety, upon which recovery is sought, and various correspondence between the University and Pankow. Defendant begs leave to refer to these documents for their exact contents and differs with plaintiffs on their legal effect. Specifically, it is defendant's

position that Pankow's Proposal Performance Bond and the Request required only that the Proposal be complete, i.e., that it include the plans, model, and drawings required by Division 3 of the Request, and not, as apparently contended by plaintiffs, that it meet the various design criteria of the balance of the Request; that Pankow's proposal was complete; and that, if Pankow's proposal were not complete, which is denied, the University waived, or is estopped from asserting, any such deficiency in the proposal. With this clarification, defendant submits that there exist genuine issues to be tried with respect to the following material facts:

1. Whether it was possible to design and construct facilities meeting the criteria described in the Request for $5,730,000.

2. Whether the proposals of the Carlson Corporation and of plaintiffs were complete.

3. Whether or not Pankow's proposal was sufficently detailed for evaluation.

4. Whether the University, in order to qualify for financial assistance from the United States Department of Housing and Urban Development ("DHUD") and/or the United States Office of Education ("OE"), was

required to have at least three proposals for the Living/Learning Center.

5. Whether the University used Pankow's proposal to meet a requirement of DHUD and/or OE that it have at least three proposals for the Living/Learning Center and thereby waived, or became estopped from asserting through its assignees, any contention that Pankow's proposal was incomplete and incapable of evaluation.

6. Whether the University in fact proceeded with the design and construction of the Living/Learning Center and, if so, what was the ultimate price paid to the Carlson Corporation for such design and construction.

7. What was the nature of the facilities constructed and in what manner do those facilities meet the criteria of the Request.

II. With respect to defendant's motion for summary judgment, defendant submits that there exist no genuine issue to be tried with respect to the following material facts:

1. At the time of submission by Pankow of its Proposal Performance Bond, and on and after July 2,

1971, when Pankow elected to submit a proposal, there was no way in which the University could have been damaged by Pankow's failure to submit a proposal or, in the alternative, no way in which the University's damages, if any, could have approached $20,000.

2. At the time of submission by Pankow of its Proposal Performance Bond, and on and after July 2, 1971, when Pankow elected to submit a proposal, there was no way in which other bidders could have been damaged by Pankow's failure to submit a proposal.

3. Neither the University or its assignees, the plaintiffs, were damaged in any way by the alleged deficiencies in Pankow's proposal.

4. Pankow's proposal contained the drawings, model and written report required by Division 3 of the Request and was accompanied by a "letter of clarification", copy of which is annexed as Exhibit "3" to plaintiffs' moving papers, in which Pankow stated, in substance, that its proposal would cost $392,000 over $5,730,000 and that in order to reduce the cost to $5,730,000 certain specified reduction in the site work and other modifications acceptable to the University would have to be made.

Defendant's Statement Pursuant to
District Court General Rule 9(g)

5. By undated letter delivered on September 13, 1971, to Pankow's representative who had delivered the proposal to the University of Vermont, copy of which is annexed to the affidavit of R. J. Osterman as Exhibit "B", the University asked Pankow "... to either withdraw the Letter of Clarification, or specify exactly which portions of the Proposal will be modified or removed to comply with the fixed price of $5,730,000 ..." (emphasis added) and gave Pankow until 9:00 A.M. on September 15, 1971, less than 2 days, to respond. By said letter, the University offered, in substance, to waive any objections it had to the form of Pankow's proposal if Pankow would specify exactly which portions of the Proposal would be modified or removed in order to reduce the price to $5,730,000.

6. In view of the fact that the University permitted Pankow less than two days in which to respond to its offer to waive any objections to the form of Pankow's proposal upon Pankow's specification of the portions of the Proposal to be modified or removed, said offer did not contemplate that Pankow should submit revised site plans, model, and drawings.

7. Pankow accepted the University's

offer by telegram transmitted on September 15, 1971, which voided the "letter of clarification" and specified the reductions to be made in order to meet the desired price of $5,730,000, namely certain specified reductions in the site work, changing of corridor widths in the living centers to 4 foot minimum for public corridors and to 3 foot minimum for corridors within the individual apartments, elimination of all painting of interior concrete, and elimination of one of the five living centers and the replacement of this area by the addition of one floor to three of the remaining four living centers.

8. Pursuant to Sections 2A-3.01, 2A-12.02, 5B-1.01 and 5B-1.02 of the Request, an Evaluation Committee constituted under Division 5 of the Request was to determine, by majority opinion, whether a proposal was "complete" for purposes of the bidder's Proposal Performance Bond and the Evaluation Committee was authorized pursuant to Section 2A-3.01 of the Request to waive informalities in a proposal.

9. The University, in breach of the terms of the Request, failed and refused to submit Pankow's proposal to the Eva'uation Committee.

10. At no time did a majority of the Evaluation Committee determine that Pankow's proposal was not complete.

Affidavit of R. J. Osterman
In Support of Defendant's Cross-Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

[SAME TITLE]

72 Civ. 5180
(Judge Tenney)

- x

R. J. OSTERMAN, being duly sworn, says:

1. I am Vice President of Charles Pankow, Inc. I make this affidavit in opposition to plaintiffs' motion for summary judgment in the captioned action and in support of defendant's cross-motion for summary judgment dismissing the complaint.

Background

2. On or about June 18, 1971, Charles Pankow, Inc. ("Pankow"), a California corporation, one of several pre-qualified contracting firms, submitted to the University of Vermont ("the University"), plaintiffs' assignor, a Proposal Performance Bond, copy of which is annexed hereto as Exhibit "A". Said bond, in the amount of $20,000.00 and executed by Pankow, as principal, and defendant Federal Insurance Company ("Federal") as surety, provided as follows:

> "Whereas the Principal [Pankow] has been pre-qualified as a Design/Build Team for Project 73 Living/Learning Center, Burlington, Vermont, and upon the filing of this bond will be issued a copy of the request for Design/Build Proposals,
>
> "NOW THEREFORE, if the said Principal shall notify the University in writing before July 2, 1971, that they cannot prepare an adequate proposal or shall submit on or before 2 o'clock P.M., August 23, 1971, a complete Design/Build Proposal, then this obligation shall be void; otherwise the bond will be forfeited into the University of Vermont as liquidated damages."

3. On or about June 21, 1971, upon receipt of said Proposal Performance Bond, the University sent to Pankow a 250 page document entitled "University of Vermont-Project 73 - Living/Learning Center - Request for Design/Build Proposals" ("the Request"), copy of which is to be submitted by plaintiffs as Exhibit "9" to their moving papers. The Request set forth detailed criteria for a combined residential and educational facility which the University hoped to have designed and built for $5,730,000 by the contracting firm whose proposal it selected. Under the terms of the Request, Pankow (and the other pre-qualified contracting firms) had until July 2, 1971, only 1-1/2 weeks after receipt of the Request, in which to decide whether to submit a proposal. Under the terms

of the Request, the University was required to issue on July 6, 1973, formal notice to the competitors to commence work on their proposals which were due on September 6, 1973. Thus Pankow (and its competitors) had only 9 weeks in which to prepare a proposal for this $5,730,000 project. These times are stressed because, it is respectfully submitted, the University's requirements in its Request must be viewed in the light of the limited time permitted for their accomplishment.

4. By letter dated July 2, 1971, copy of which is annexed as Exhibit "1" to plaintiffs' moving papers, Pankow advised the University that it would submit a proposal and requested that the University notify it, as provided in the Request, if it was to commence work. On July 6, 1971, the University advised Pankow, by telephone, to commence work. By letter dated July 7, copy of which is annexed as Exhibit "2" to plaintiffs' moving papers, the University confirmed its advice to commence work and forwarded to Pankow additional essential information, viz., site description showing location of utilities, boring log and plan of boring locations, and building standards for the handicapped.

5. Pankow retained Consultants Network, Inc. ("Consultants Network"), a California structural engineering firm, to design its proposal for the Living/Learning Center and incurred fees of approximately $25,000 to Consultants Network and to other consulting firms in connection with the development of Pankow's proposal. If the value of the time devoted to development of this proposal by Pankow's own personnel is included, the cost to Pankow of developing its proposal was approximately $50,000.

6. By telegram dated August 17, 1971, the University extended the time for submission of proposals for 1 week until September 13, 1971, and on that date Pankow's proposal was delivered by hand to the University.

7. Pankow's proposal was complete and contained the drawings, model and written report required by Division 3 of the Request. The Proposal was accompanied by the "letter of clarification", copy of which is annexed as Exhibit "3" to plaintiffs' moving papers, in which Pankow stated, in substance, that its proposal would cost $392,000.00 over the desired cost of $5,730,000 and that in order to reduce the cost to $5,730,000 certain specified reductions in the site work and other modifications

acceptable to the University would have to be made.

8. The need for the "letter of clarification" arose as follows: In developing a design/build proposal such as that sought by the University, as in any task, it was necessary to start some place. The logical starting point in this case was to design a facility that met all of the University's suggested criteria. The next step was to analyze the cost to construct the proposal. The final step was to modify the proposal as required to meet the desired cost. When Pankow received from Consultants Network the drawings, specifications, and model for its proposal, its analysis revealed that the Living/Learning Center as designed would cost substantially more than $5,730,000. This primarily was due to the fact that the suggested facilities meeting all criteria of the Request required floor space of approximately 220,000 square feet rather than the approximately 180,000 square feet recommended in the Request. In fact, it is Pankow's opinion and that of its consultants, that there is no way in which all of the desired facilities could have been provided for $5,730,000 and that its competitors similarly must have either quoted a higher price or provided less than the ideals set forth in the Request.

9. Operating under the severe time limitations of the Request, there simply was no time to modify the drawings, specifications, and model to reflect a reduction in cost of $392,000. In addition, such reductions normally are matters of negotiation between designer and owner. Pankow, in its "letter of clarification", therefore set forth various reductions in site work (which had the additional advantage of substantially reducing the up and down travel for physically handicapped students) and offered to make whatever modifications were acceptable to the University in order to meet the budget of $5,730,000.

10. By undated letter delivered on September 13, 1971 to Pankow's representative who had delivered the proposal to the University in Vermont, copy of which is annexed hereto as Exhibit "B", the University asked Pankow "... to either withdraw the Letter of Clarification, or specify exactly which portions of the Proposal will be modified or removed to comply with the fixed price of $5,730,000." (Emphasis added.) The University added that "... until either course is chosen by you and explained to us, in writing or by telegram with covering letter, we must consider your Proposal to be incomplete ..." and gave Pankow until 9:00 A.M. on September 15, 1971, less than 2 days, to respond.

11. By telegram sent to the University on September 15, 1971 copy of which is annexed hereto as Exhibit "C", Pankow complied with the University's directive and specified exactly which portions of its proposal would be modified or removed to comply with the fixed price of $5,730,000. Certain of the University's officials, however, unilaterally rejected Pankow's proposal and in violation of the express terms of the Request refused even to submit the proposal to the Evaluation Committee established under the terms of the Request.

Terms of the Request and of Pankow's Bond

12. Review of the relevant provisions of the Request and of Pankow's bond establish (1) that the Proposal Performance Bond was to insure submission of a complete proposal - i.e. a proposal which contained the documents prescribed in Division 3 of the Request - rather than a proposal which met all the design criteria of Division 4; (2) that deficiencies in the prescribed documents could be waived by the University, (3) that the design requirements and criteria set forth in Division 4 merely were suggested standards to be used in evaluating the proposals rather than rigid requirements

which had to be met, and (4) that the determination as to whether a proposal was "complete" was to be made by the Evaluation Committee established under the Request.

13. That the Proposal Performance Bond was to insure submission of a complete proposal rather than submission of a proposal meeting all the criteria of Division 4 of the Request is clear not only on the face of the bond but in Sections 2A-1.01 and 2A-2.03 of the Request. Thus Section 2A-1.01 requires that "... proposals must include all documents specified in Division 3 ...", rather than that proposals should meet all of the design criteria specified in Division 4.

14. Under Section 2A-3.01 of the Request, the University expressly was permitted to waive deficiencies in proposals. Thus the section provides that:

> "The University may consider informal any proposal not prepared and submitted in accordance with the provisions hereof, and may waive any informalities ..."

15. Sections 1B-1.02 and 4C-0-1.01 confirm that the various design requirements and criteria set forth in Division 4 were only suggested standards to be used in evaluating proposals rather than rigid requirements which had to be met. Thus Section 1B-1.02 provides

that the population of the Living/Learning Center will be approximately 630 persons and Section 4C-0-1.01 provides that:

> "The general objective of the Living/Learning Center Program [Division 4 of the Request setting forth the various design criteria] as presented in this Request for Design/Build Proposals is to provide a guide for Design/Build Teams. All requirements listed are suggested minimum standards ..." (Emphasis added.)

16. The method of evaluation specified in Division 5 of the Request also confirms that the various design criteria are only suggested standards. The proposals were to be evaluated on a 1-10 point scale for the various criteria (see Sections 5A-3.01 and 5B-2.01 of the Request) and, it is submitted, such a method of evaluation simply would make no sense if the criteria were rigid requirements to be met on pain of forfeiture of the bond.

17. Finally, the Request expressly provides that the determination as to whether a proposal was "complete" was to be made by an Evaluation Committee established under Division 5 of the Request and that the majority opinion of that committee would control. Thus Section 2A-3.01 of the Request provides, in part, as follows:

> "If in the majority opinion of the Evaluation Committee, any Design/Build Proposal is incomplete, that Design/Build Proposal will be considered as having not been submitted."

Section 2A-12.02 of the Request provides that "... evaluation and selection will be carried out according to the procedures described in Division 5 ..." of the Request and Division 5, specifically provides, in Section 5B-1.01, that "... members of the Evaluation Committee will first examine each Design/Build Proposal to determine whether the following Design/Build Proposal documents have been provided (see Division 3) ..." and, in Section 5B-1.02, that "... the absence of any required document may be cause for disqualification."

The Position of Pankow and Federal

18. It is the position of Pankow and Federal (1) that the proposal of Pankow contained all of the documents required under Division 3 of the Request and, therefore, was complete; (2) that, in the alternative, the University waived any informalities in the proposal; and (3) that the University, in breach of its obligations under the request, failed and refused to present Pankow's proposal to the Evaluation Committee for its determination whether or not the proposal was complete; and (4)

that, in any event, forfeiture of the Bond constitutes an unenforceable penalty rather than liquidated damages.

19. The University, plaintiffs' assignor, in effect, concedes that Pankow's proposal was complete containing the required drawings, model, and written report but maintains that the proposal was rendered incomplete by Pankow's "letter of clarification" dated September 13, 1971, and superseding telegram of September 15, 1971 (see moving affidavit of Melvin A. Dyson, pp. 6-7). As noted above, the "letter of clarification" stated that the proposal would cost $392,000 in excess of the desired price of $5,730,000 and that certain reductions in the site work and other reductions agreeable to the College would have to be made.

20. Also as noted above, upon receipt, of the "letter of clarification" on June 13, 1971, the University advised Pankow that it would have to "... either withdraw the letter of clarification or specify exactly which portions of the proposal [would] be modified or removed to comply with the fixed price of $5,730,000 ..." (emphasis added) by 9:00 A.M. on September 15, 1971, less than 2 days later. This Pankow did by telegram transmitted on September 15, 1971 which voided the "letter

of clarification" and specified the reductions to be made in order to meet the desired price of $5,730,000, namely certain specified reductions in the site work, changing of corridor widths in the living centers to 4 foot minimum for public corridors and to 3 foot minimum for corridors within the individual apartments, elimination of all painting of interior concrete, and elimination of one of the five living centers and the replacement of this area by the addition of one floor to three of the remaining four living centers.

21. It is my opinion, based on many years experience in developing design/build proposals in the manner sought by the University that the reductions were amply specific to allow the Evaluation Committee, given the expertise and qualifications of its members, to evaluate Pankow's proposal. The specific objections raised in the moving affidavit of Melvin A. Dyson will be dealt with seriatim.

22. The University objects to the reservation by Pankow in its telegram of September 15, 1971, of the right to revise the mechanical, electrical and structural systems (Dyson affidavit pp. 5, 8 and 9). The telegram, however, also stated that any provisions "would maintain

the respective design criteria and architectural character of the project" and thus concerned only details of the mechanical, electrical, and structural systems which could not be tied down at that early stage of development of the plans; the basic concepts were to remain unchanged. Simply stated, the reservation merely made explicit what was implicit in all other proposals.

23. The University objects to the proposed changes in the site work and in the corridor widths, and the elimination of one of the living centers and the addition of a floor to 3 of the remaining centers because there were no site plan, model and drawings reflecting these modifications (Dyson affidavit, pp. 7-9). The University, however, in effect accepted Pankow's proposal subject to Pankow's specifying which portions of the proposal would be modified or removed to meet the desired price of $5,730,000 (see Exhibit "B") which Pankow did. The University permitted Pankow less than 2 days in which to specify the modifications so its obvious that it was not contemplated nor intended that Pankow should submit revised site plans, model and drawings.

24. Finally, the University objects that Pankow's proposal as modified violated the Request because

it would either house less students or require a greater concentration of students in each living center than called for in Division 4 of the Request (Dyson affidavit, p. 9). However, as noted above, criteria of Division 4 were only suggested standards and were and are irrelevant to a determination that Pankow's proposal was or was not complete.

25. By reason of the foregoing it is submitted that for purposes of the Proposal Performance Bond, Pankow's proposal was complete and that the University waived any right it may have had to drawings and models of the modifications by requiring on September 13, 1971, that Pankow simply specify the modifications contemplated by September 15, 1971, less than 2 days later.

26. In addition, it should be noted that prior to the submission by Pankow of the Proposal Performance Bond sued upon, the University had represented to Pankow that the purpose of the bond was to insure compliance with a requirement that there be at least three proposals imposed by the Department of Housing and Urban Development ("DHUD") which was partially financing the project. Since only three proposals, including Pankow's, were submitted (Dyson affidavit, p. 6) and since the project

apparently did proceed, it appears that the University regarded Pankow's proposal as complete for the purpose of satisfying the DHUD requirement but incomplete for the purpose of satisfying the condition of the Proposal Performance Bond. Such a double standard should not be permitted, and, it is submitted, the University must be deemed to have waived any deficiency in Pankow's proposal or to be estopped from asserting any such deficiency.

27. Perhaps the greatest impediment to plaintiffs' recovery in this action lies in the failure of the University to submit Pankow's proposal to the Evaluation Committee for its determination as to whether the proposal was complete. As noted above, under the terms of the Request, Pankow had the right to have this determination made by the Evaluation Committee and only if a majority of the Evaluation Committee found the proposal deficient and elected not to waive the informalities could the proposal be disqualified and deemed not to have been submitted (see Sections 2A-3.01, 5B-1.01, and 5B-1.02 of the Request). This the University concedes was not done (Dyson affidavit, pp. 8 and 10). In contrast, certain of the officials of the University, in

breach of the University's obligations under the Request, apparently took it upon themselves to reject Pankow's proposal without even submitting it to the Evaluation Committee. The University, through its assignees, seeks to hold Pankow to a strict standard of compliance with the terms of Request at pain of forfeiture of $20,000. In fairness, the University must be held to a standard no less strict. The University concededly having violated its obligations, it is submitted that recovery herein must be denied.

28. Finally, even if Pankow's proposal were deficient, which is denied, or even if Pankow completely failed to submit a proposal, such deficiencies or failure in no way could have damaged the University or it assignees. Therefore, as set forth in the accompanying memorandum of law, the forfeiture of the $20,000 Proposal Performance Bond is not a legitimate assessment of liquidated damages but rather is an unenforceable penalty. For this reason also, the relief sought by plaintiffs must be denied.

WHEREFORE, It is respectfully submitted that plaintiffs' motion for summary judgment be denied and that summary judgment dismissing the complaint be granted.

Sworn to by R. J. Osterman on September 18, 1973.

Exhibit A Annexed to Osterman Affidavit
In Support of Defendant's Cross-Motion

This is the first page of the proposal performance bond signed by Charles Pankow, Inc. It is the same as pages 29a and 30a *supra*.

Exhibit B Annexed to Osterman Affidavit
In Support of Defendant's Cross-Motion

This exhibit is the same as pages 71a and 72a supra.

Exhibit C Annexed to Osterman Affidavit
In Support of Defendant's Cross-Motion

This exhibit is the same as pages 73a, 74a and 75a supra.

Affidavit of Cecil Holland, Jr.
In Support of Defendant's Cross-Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

OGDEN DEVELOPMENT CORPORATION and THE DWIGHT BUILDING COMPANY,

Plaintiff,

-against-

FEDERAL INSURANCE COMPANY,

Defendant.

72 Civ. 5180
(Judge Tenney)

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CECIL HOLLAND, JR., being duly sworn, says:

1. I am an attorney associated with the firm of Hart & Hume, attorneys for defendant in the captioned matter. I make this affidavit in opposition to plaintiffs' motion for summary judgment and in support of defendant's cross-motion for summary judgment dismissing the complaint.

2. Defendants seek dismissal of the complaint upon the grounds (a) that forfeiture of the Proposal Performance Bond at issue constitutes an unenforceable

penalty, (b) the breach by The University of Vermont ("the University"), plaintiffs' assignor, of its obligation to submit the proposal of defendant's principal, Charles Pankow, Inc. ("Pankow"), to the Evaluation Committee for a determination that the proposal was or was not complete precludes recovery of the Proposal Performance Bond, and (c) that waiver by the University, plaintiffs' assignor, of any deficiency in Pankow's proposal precludes recovery on the Proposal Performance Bond.

3. With respect to the first ground for dismissal, plaintiffs concede that the University's damages, if any, through the failure of Pankow, or any other bidder, to present a complete proposal could not be substantial (plaintiffs' Memo., p. 7). Plaintiffs then seek to avoid the inescapable conclusion that the forfeiture of $20,000 thus is an unenforceable penalty by arguing that the Proposal Performance Bond and the Request for Design/Build Proposals ("the Request") constitute a contract for the benefit of third-parties (plaintiffs' memorandum, p. 20 et seq.). For the reasons set forth in defendant's memorandum of law, it is respectfully submitted that this argument is without merit and must be rejected.

4. With respect to the second ground for dismissal, plaintiffs concede that the University never submitted Pankow's proposal to the Evaluation Committee for its determination of whether said proposal was complete (Dyson affidavit, pp. 8 and 10). The plaintiffs seek to avoid the impact of this breach by the University of the rules of the Request by contending there was no need to submit the proposal to the Evaluation Committee because it was too incomplete to evaluate. Plaintiffs, however, ignore that under the terms of the Request (Sections 2A-3.01, 5B-1.01, 5B-1.02 and the balance of Division 5), the Evaluation Committee had two distinct functions: (1) to determine whether proposals were complete for purposes of the proposal performance bonds, and (2) to evaluate the relative merits of the complete proposals.

5. With respect to the third ground for dismissal, the acts of the University constituting its waiver of any deficiencies in Pankow's proposal are set forth in the accompanying affidavit of R. J. Osterman (paras. 7-11 and 19-25).

6. There is a further possible basis for a finding of waiver by the University of any deficiencies

in Pankow's proposal which defendant should be permitted to pursue if the instant cross-motion for summary judgment dismissing the complaint is denied. As set forth in the accompanying affidavit of R. J. Osterman (para. 26), prior to the submission by Pankow of the Proposal Performance Bond sued upon, the University had represented to Pankow that the purpose of the bond was to insure compliance with a requirement of the United States Department of Housing and Urban Development ("DHUD") that there be at least 3 proposals for the Living/Learning Center. Inquiry at the New York Regional Office suggests that there was in fact such a requirement. Thus a manual of the Housing and Finance Agency, Community Facilities Administration, DHUD, entitled Policy and Procedures for Community Facilities Operations - Field Service (Volume VI, Chapter 2-5, "College Housing") which was in effect during the period in question and is available at the New York Regional Office, provides in part as follows:

> "The instructions for preconstruction activities for the College Housing Program are provided in Sections 20-1-1 and 20-1-2, except as supplemented below.
>
> BIDDING BY INVITATION

> "Some private colleges have an established policy of issuing invitations to selected contractors. The Regional Director may in such cases approve a request for permission to extend bid invitations only to selected contractors, provided the owner agrees to permit any bona fide contractor not on the selected list to obtain contract documents and submit a bid.
>
> "The list of contractors to be invited to bid must be adequate in number, and the location of their places of business should be such as to insure equitable competition.
>
> "The term "adequate in number" should be construed flexibly. In heavily populated areas, an institution should be able to select at least eight or ten qualified contractors. In some sections, it is quite possible that this number of bidders would not be obtained even through public advertisement for bids, and therefore a lesser number, at least 3, may be adequate." (Emphasis added)

7. If, as appears likely, there was a DHUD requirement for at least 3 proposals, the University may have regarded Pankow's proposal as complete for the purpose of satisfying the DHUD requirement (since only three proposals including Pankow's were submitted [Dyson affidavit, p. 6]) but incomplete for the purpose of satisfying the condition of the Proposal Performance Bond. Such a double standard should not be permitted and, it is submitted, defendant should be permitted to pursue this matter in pre-trial discovery.

8. In addition to the possible requirement for 3 proposals, there are, as demonstrated by the Rule 9(g) statements, numerous other issues of fact requiring trial if defendant's motion is denied. In connection with these, pre-trial discovery is required and, while defendant has yet to commence such discovery, it will do so expeditiously if the instant motions are denied.

9. Finally, defendant requests leave to withdraw its seventh affirmative defense. In preparing defendant's answer, the provisions of the Pre-Qualification Documents (plaintiffs' Exhibit "B", last page) and the Request (plaintiffs' Exhibit "8", page 7A-1) reserving to the University the right to extend the time for any phase of the Living/Learning Center project were overlooked.

WHEREFORE, it is respectfully submitted that the instant cross-motion for summary judgment dismissing the complaint be granted and that plaintiffs' motion for summary judgment should be denied.

Sworn to by Cecil Holland, Jr. on September 24, 1973.

Affidavit of William W. Owens dated 9/26/73
In Support of Plaintiffs' Motion and
In Opposition to Defendant's Cross-Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

[SAME TITLE] 72 Civil 5180 CHT

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM W. OWENS, being duly sworn, deposes and says:

I am a member of the firm of Rogers & Wells, attorneys for plaintiffs in the above entitled action. I make this affidavit in answer to defendant's cross-motion for summary judgment dismissing the complaint.

Almost everything necessary to the determination of both motions is in plaintiffs' moving papers and defendant's cross-moving papers. I ask that plaintiffs' moving papers be treated as answering papers in opposition to the cross-motion. My reply memorandum, submitted herewith, explains, sometimes repetitiously in view of my moving memorandum, the untenability of defendant's contentions. I have only a few additional facts to relate.

Affidavit of William W. Owens dated 9/26/73
In Support of Plaintiffs' Motion and
In Opposition to Defendant's Cross-Motion

There is a statement, at the end of section 8 of defendant's Osterman affidavit, that Pankow and its consultants are of the opinion that its competitors (i.e. Carlson and Ogden/Dwight) must either have quoted a higher price or have "provided less than the ideals set forth in the Request." He does not say that Pankow or its consultants have looked at the other proposals.

Nine and a half months have elapsed since this action was commenced and almost eight months since defendant answered the complaint. Notice of plaintiffs' motion was served on July 27, 1973. By reason of three extensions of time, defendant was given sixty-seven days to serve its answering papers. In all this time defendant has made no effort to ascertain whether in fact the Carlson and Ogden/Dwight proposals did comply with the Request.

In September 1971, within ten days after the contract was awarded to Carlson, a representative of plaintiffs went to Burlington and was permitted to see and analyze the Carlson proposal. I was in Burlington on September 14, 1972. I was permitted to see the

Carlson written report and was offered an opportunity to see the Carlson drawings and the Carlson model. The same courtesy, I am certain, would have been extended to Pankow and would still be extended if Pankow were to request it.

If defendant had any doubt whether plaintiffs had complied with the Request, it had ample time, through discovery, to request plaintiffs to supply defendant with copies of their written report and drawings. Plaintiffs' model is still in Burlington, but the University would not have denied defendant an opportunity to see it.

In the light of the affidavit by Melvin A. Dyson, the University's chief financial officer, that the Carlson and Ogden/Dwight proposals <u>did</u> comply with the Request, there is no virtue in suggesting that maybe they didn't while avoiding any effort to ascertain whether they did.

Sworn to by William W. Owens on September 26, 1973.

COPY RECEIVED
HART & HUME
Attornies for Federal Ins
July 19, 1974